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March 21, 2002

EX PARTE

Mr. William Caton
Acting Secretary
Federal Communications Commission
445 12th Street, SW, Portals
Washington, DC 20554

RE: Application by Verizon New England Inc. for Authorization To Provide In-Region, InterLATA Services in State of Vermont, Docket No. 02-7

Dear Mr. Caton:

At the request of the staff, Verizon is providing answers to several questions regarding Verizon's application for long distance authority in Vermont. The twenty-page limit does not apply as set forth in DA 01-2746.

Combinations of Network Elements. The Commission staff asked about the availability of new combinations of network elements in Vermont and Massachusetts. The Vermont Public Service Board ("Vermont PSB") directed Verizon to provide new combinations of network elements and to combine network elements at the request of CLECs. *See* Docket No. 5900, *Joint Petition of New England Telephone & Telegraph Company d/b/a NYNEX, NYNEX Corporation, and Bell Atlantic Corporation for Approval of a Merger of a Wholly-Owned Subsidiary of Bell Atlantic Corporation into NYNEX Corporation (In Re: Compliance Phase)*, Order entered June 29, 1999 (attached hereto as Attachment 1); Reconsideration Order entered: Jan. 31, 2000 (attached hereto as Attachment 2). Verizon implemented these requirements in Vermont through its statement of generally available terms and conditions and its interconnection agreements. *See* VT SGAT, § 5.10.2 (VT App. J, Tab 2 at 5-121) ("The Telephone Company will perform the necessary functions to combine unbundled loop and IOF transport elements to provide EEL arrangements"); § 5.12.3.1(A) (VT App J, Tab 2 at 5-128) ("Orders for UNE-P combinations will be divided into the following classes. . . . 2. New – The connection of a previously uncombined unbundled loop and port (to a specific business or residence end user customer) for the provision of local exchange and associated switched exchange access service"); Model Interconnection Agreement, Network Elements Attachment, Section 1.1 (VT App. J, Tab 1 at 83) ("Verizon shall provide to ***CLEC Acronym TXT***, in accordance with this Agreement (including, but not limited to, Verizon's applicable Tariffs) and the requirements of Applicable Law, access to Verizon's

Network Elements on an unbundled basis and in combinations (Combinations)"). The Vermont PSB subsequently held that these SGAT amendments were in compliance with its previous orders in Docket No. 5900. *See* Docket No. 5900, *Joint Petition of New England Telephone & Telegraph Company d/b/a NYNEX, NYNEX Corporation, and Bell Atlantic Corporation for Approval of a Merger of a Wholly-Owned Subsidiary of Bell Atlantic Corporation into NYNEX Corporation (In Re: Compliance Phase)*, Closing Order entered Sept. 21, 2000, at 2 (attached hereto as Attachment 3).

Verizon appealed the decisions of the Vermont PSB that required Verizon to combine network elements that were not already combined in Verizon's network. On February 22, 2002, the Supreme Court of Vermont upheld the Vermont PSB's orders requiring Verizon to combine network elements. *See In re Petition of Verizon New England Inc. d/b/a Verizon Vermont*, Supreme Court Of Vermont No. 2000-118, 2002 Vt. LEXIS 12 (Feb. 22, 2002). The Supreme Court's decision had no effect on Verizon's operations in Vermont or the availability of new combinations of network elements in Vermont. Verizon's appeal to the Supreme Court did not stay the Vermont PSB's orders. For more than two years, Verizon has been providing new combinations in accordance with the Vermont PSB's orders despite its pending appeal. Verizon is continuing to provide those same new combinations of network elements following the Vermont Supreme Court's decision.

Verizon also provides new combinations of network elements and combines network elements at the request of CLECs in Massachusetts. *See* MA DTE Tariff No. 17, § 13.2.1 (MA Supplemental Filing, App. B, Tab 3, Subtab C at 215) ("The Telephone Company will perform the necessary functions to combine unbundled loop and IOF transport network elements to provide EEL arrangements"); § 15.3.1A (MA Supplemental Filing, App. B, Tab 3, Subtab C at 224) ("Orders for UNE-P combinations will be divided into the following classes, neither of which is subject to the BFR process. . . . 2. New – The connection of a specific loop and port not currently connected (but which is ordinarily combined in the Telephone Company's network) for the provision of local exchange and associated switched exchange access services to a specific business or residence end user customer"). The new combinations of network elements that are available in Massachusetts are the same new combinations of network elements that are available in Vermont.

Dark Fiber. The staff requested an update on the Pennsylvania *Yipes* dark fiber arbitration which was pending during the Pennsylvania 271 proceeding. The Pennsylvania commission issued its final order in the *Yipes* arbitration on October 12, 2001. *See Petition of Yipes Transmission, Inc. for Arbitration Pursuant to Section 252(b) of Telecommunications Act of 1996 to Establish an Interconnection Agreement With Verizon Pennsylvania, Inc.*, Docket No. A-310964 (adopted October 12, 2001) ("*Yipes Order*") (rejecting the arbitrator's recommendation that Verizon be required to provide access to unbundled dark fiber at splice points and deferring the dark fiber technical feasibility issues to the Technical Workshop). A copy of the *Yipes Order* is attached as Attachment 4. However, in that order, the Pennsylvania commission did not issue a final decision on the technical feasibility of accessing dark fiber at new and existing splice points in that order. In the meantime, on June 8, 2001, the Pennsylvania PUC established a Technical Workshop to address dark fiber issues raised in another proceeding. *See Further Pricing of Verizon Pennsylvania, Inc.'s Unbundled Network Elements,* Interim Opinion and Order, Docket No. R-00005261 (June 8, 2001) at 58. The Pennsylvania PUC deferred the dark fiber technical feasibility issues raised in the *Yipes* arbitration to that Technical Workshop. *See Yipes Order* at Additionally, the New York Public Service Commission ("New York PSC") has considered the issue of routing of dark fiber through intermediate offices in response to a CLEC petition. *See*

Proceeding on Motion of the Commission to Examine Issues Concerning the Provision of Digital Subscriber Line Services, Order Granting Clarification, Granting Reconsideration in Part and Denying Reconsideration in Part, and Adopting Schedule, Case No. 00-C-0127, Jan. 29, 2001. A CLEC argued before the New York PSC that Verizon should be required to connect fibers to create new routes through intermediate central offices. The New York PSC rejected this argument finding that such a requirement went beyond the FCC's regulations. *Id.* at 16.

In its Consultative Report, the Vermont PSB indicated that it would be appropriate to address certain unbundled dark fiber issues raised by CTC in a separate proceeding. *See Application of Verizon New England. d/b/a Verizon Vermont for a Favorable Recommendation to Offer InterLATA Services Under 47 U.S.C. §271,* Comments on Federal Proceeding, Docket No. 6533, February 6, 2002 at 25. The Vermont PSB also noted that it may well address many of the dark fiber issues in the context of an arbitration between CTC and Verizon should the parties fail to reach an agreement during their interconnection negotiations. *Id.* In its *Pennsylvania 271 Order*, the Commission found that individual CLEC concerns regarding unbundled dark fiber were "best resolved through the section 252 negotiation and arbitration process . . . or through the Section 208 complaint process." *Pennsylvania 271 Order* ¶ 113. Verizon and CTC have not yet reached agreement on the dark fiber provisions of CTC's interconnection agreement. CTC can invoke its Section 252 arbitration rights in early April. Consistent with the *Pennsylvania 271 Order*, the Commission should permit the Vermont PSB to address CTC's dark fiber concerns.

Sincerely,

cc: J. Veach
J. Stanley
G. Remondino
C. Newcomb
P. Megna

ATTACHMENT 1

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 5900

Joint Petition of New England Telephone & Telegraph Company d/b/a NYNEX, NYNEX Corporation, and Bell Atlantic Corporation for approval of a merger of a wholly-owned subsidiary of Bell Atlantic Corporation into NYNEX Corporation (In Re: Compliance Phase)	))))))	Hearings at Montpelier, Vermont June 16 and 17, 1998

Order entered: 6/29/99

Present: Peter M. Bluhm, Hearing Officer
George E. Young, Hearing Officer

Appearances: Sheldon Katz, Esq.
for Vermont Department of Public Service

Thomas M. Dailey, Esq.
New England Telephone & Telegraph Company d/b/a Bell Atlantic

* William B. Piper, Esq.
Primmer & Piper, P.C.
for Northland, Shoreham, Topsham, Franklin, Northfield, Perkinsville, Ludlow, Waitsfield, Champlain and Vermont Telephone Company

* William D. Smith, Esq.
NYNEX Corporation

* Mark J. Mathis, Esq.
John M. Walker, Esq.
Bell Atlantic Corporation

* Eleanor Richter Olarsch, Esq.
AT&T Communications of New England, Inc.

* Robert Glass, Esq.
Glass, Seigle & Liston
for MCI Telecommunications Corporation

* Richard C. Fipphen, Esq.
MCI Telecommunications Corporation

* Did not appear at hearings.

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Summary

As a condition of its merger with NYNEX, the Public Service Board ordered New England Telephone and Telegraph Company d/b/a Bell Atlantic-Vermont ("BA" or "Bell Atlantic") to comply with the "Competitive Checklist" in the Federal Telecommunications Act of 1996. Today's Order finds that Bell Atlantic has substantially complied with this requirement, although in some areas Bell Atlantic must take further action. These additional actions include:

1. Modifying its Statement of Generally Available Terms to:
    a. Provide for the return of a CLEC's full deposit if physical collocation space is not available.
    b. Allow CLECs to purchase combined UNEs in any manner that is consistent with the FCC's reinstated rules.
    c. Cease imposing a 10 percent markup on pole attachment work performed for other carriers.
    d. Make reference to the appropriate pole attachment tariff.
    e. Permit resale of toll service at an appropriate discount.
2. Within 60 days, preparing a list showing the approximate square footage in each central office that is unoccupied and that could support physical collocation by CLECs, and making this list available at the Board and to CLECs upon request.
3. Within 60 days, demonstrating in a compliance filing that BA has met its stated goal of a four-second response time as to all types of CLEC preordering inquiries.

Introduction and History

On February 26, 1997, the Board issued an Order in this Docket approving Bell Atlantic Corporation's acquisition of NYNEX Corporation, the holding company of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Vermont ("BA" or "Bell Atlantic").[1] The Board imposed conditions on the merger. Paragraph number four required that BA comply with the "Competitive Checklist" by September 30, 1997.[2] The Competitive Checklist is described in Section 271 ("Section 271") of the Telecommunications Act of 1996 ("Act").[3] It contains 14 items, although there is some redundancy and some items have several sub-parts. The checklist

[1] Order of 2/26/97.

[2] Order of 2/26/97 at 36, 43.

[3] 47 U.S.C. § 271(c)(2)(B).

describes many of the actions that a Bell operating company must take before it can receive permission from the FCC to offer inter-LATA services. Those actions are designed to permit competitive local exchange carriers ("CLECs")[4] to compete with incumbent carriers for local exchange services.

The compliance review of the Competitive Checklist condition was initially undertaken in Docket 5936, which was initially commenced to examine issues related to Bell Atlantic's efforts to obtain approval under Section 271. In June of 1998, several parties expressed concern that the standard for review of Bell Atlantic's compliance with Docket 5900 merger conditions was different from that which would apply under Section 271. To make clear that the facts and possibly the standards in the merger compliance and Section 271 relief proceedings were separate, we granted a motion of all parties to transfer the merger compliance issue back to Docket 5900.[5] We stated then that no findings from the "merger review" in this docket will be used for any purpose in any subsequent "271 review," a review that the Board still intends to conduct in Docket 5936.

Following transfer of the merger compliance issues to this docket, some parties withdrew their prefiled testimony in Docket 5936. Therefore, this proceeding has been conducted solely on evidence presented by BA and the Department of Public Service ("DPS" or "Department"). Hearings were conducted on June 17 and 18, 1998. Parties have filed briefs and reply briefs.

This proposed decision is reported to the Public Service Board in accordance with the provisions of 30 V.S.A. § 8.

Positions of the Parties

Bell Atlantic asserts that it has complied with the Competitive Checklist as of September 30, 1997, and hence has complied with the Board's merger requirement. It maintains it has met this standard through the combined effects of its Statement of Generally Available Terms ("SGAT"),[6] through its provisioning of access to its operations support system ("OSS"), through entering the Board-approved Stipulation in Docket 5713, through numerous interconnection and

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[4] Some new entrants are not CLECs, but that term is used here for simplicity.

[5] Order of 6/4/98 at 3. All testimony prefiled in Docket 5936 was also transferred. Several procedural orders from Docket 5936 established standards applicable to the review here and are reviewed below.

[6] The SGAT is exhibit Board-C-1.

resale agreements, and through its compliance with offering intra-LATA presubscription to Vermont customers. Bell Atlantic maintains that the merger has had a positive effect on competition, and it asks that the Board find that Condition 4 of the Merger Order has been satisfied and that Docket 5900 should be closed.

The DPS asserts that Bell Atlantic failed to meet the Competitive Checklist as of September 30, 1997. It criticizes Bell Atlantic's compliance in four of the fourteen checklist areas: interconnection (and collocation); unbundled network elements (and operations support systems; poles, ducts and rights of way; and resale. The DPS asserts that Bell Atlantic has impeded competition by imposing unreasonable restrictions on collocation, has refused to make available the "unbundled network element platform," has refused to permit resale of its network-based voicemail service, and has unreasonably restricted resale of special contracts and tariffed term agreements.

The DPS asks for prospective relief directing Bell Atlantic to make changes to its Statement of Generally Available Terms with regard to poles, rights-of-way, and conduit, with regard to collocation and interconnection, and with regard to nondiscriminatory access to network elements. The DPS also asks that the Board mandate some changes to Bell Atlantic's operations support system,[7] and it suggests that Bell Atlantic's failure to comply with the Competitive Checklist should result in reduced rates following Bell Atlantic's next rate case.[8]

In reply, Bell Atlantic contends that the DPS has offered no evidence that Bell Atlantic failed to meet the merger requirement as of September 30, 1997, or thereafter. Bell Atlantic also maintains that the DPS' evidence focused exclusively on proposed modifications to the SGAT which it proposed that Bell Atlantic should make *in the future* before long distance entry should be approved by the Board.[9] Finally, Bell Atlantic contends that the DPS's criticisms "go to relatively minor issues in the greater scheme" and do not establish any deficiency with respect to any of the 14 checklist items.[10] Rather, Bell Atlantic asserts that the DPS criticisms are prospective in nature, and there is no evidence that the merger itself, or Bell Atlantics subsequent

[7] Tr. 6/17/98 at 104 (Raymond).

[8] Tr. 6/17/98 at 95 (Raymond).

[9] BA Post-Hearing Brief at 1-2.

[10] *Id*. at 3.

conduct, has in any manner interfered with or impeded market entry by CLECs or the development of competition in Vermont.

Legal Standard

Earlier in this docket, the Board emphasized the importance of facilitating competition in the local exchange market. In 1997, the Board reviewed a proposed merger of New England Telephone's & Telegraph's parent company, NYNEX, with Bell Atlantic Corporation. Since the merged entity controls an incumbent carrier, the Board recognized that Bell Atlantic had advantages over CLECs. The Board approved the merger, but it also expressed "concerns with the evolution of competition in Vermont."[11] The Board concluded that the merger could have the effect of obstructing or preventing competition. Desiring that Bell Atlantic take "reasonable steps to open its network to competition,"[12] the Board required that Bell Atlantic comply with the Competitive Checklist by September 30, 1997. In essence, the Board used the checklist as a way to measure Bell Atlantic's steps to open its network to competition.[13] Compliance with the checklist constituted an important element in the Board's determination that the Bell Atlantic-NYNEX merger would promote the public good and would not have anti-competitive effects.[14]

The Competitive Checklist is only a subset of the requirements that a Bell operating company, such as Bell Atlantic, must satisfy before it can be permitted to offer inter-LATA services. 47 U.S.C. § 271, the controlling statute, contains several other requirements that are beyond the scope of inquiry here. For example, we do not consider here whether Bell Atlantic has met the requirements of "Track A" or "Track B,"[15] nor whether Bell Atlantic's entry into inter-LATA services is in the public interest.[16]

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[11] Docket 5900, Order of 2/26/97 at 35.

[12] Docket 5900, Order of 9/12/97 at 7.

[13] Docket 5900, Order of 2/26/97 at 36, 43.

[14] Docket 5936, Order of 9/12/97 at 3.

[15] Track A requires that Bell Atlantic have approved interconnection agreements with a competitor that is providing residential and business telephone exchange service. 47 U.S.C. § 271(c)(1)(A). Track B would apply where Bell Atlantic has not received a request for interconnection under specified circumstances. 47 U.S.C. § 271(c)(1)(B).

[16] The determination of public interest must be made after considering whether approval would foster competition in all relevant telecommunications markets (including the relevant local exchange service market), rather than just in the in-region, inter LATA market. *Application of Bell South Corp. for Provision of In-region*

Evaluation of Bell Atlantic's compliance initially was undertaken in Docket 5936. We resolved several legal issues in that docket before transferring the matter back to this docket. We determined that the Board's original deadline of September 30, 1997, for compliance with the Competitive Checklist would not be extended, but that compliance with the Boards original order would be measured by the facts in existence on that day precisely.[17] We also decided that NYNEX could present two principal forms of evidence in support of compliance, its various interconnection agreements and its SGAT.[18] Later, we decided that although the Competitive Checklist is a federal statute and although we would consider contemporaneous FCC interpretations of each of the checklist criteria as persuasive, when measuring Bell Atlantic's compliance with the merger conditions we would construe the checklist under state law.[19] Thereafter, recognizing that the checklist was subject to "nationally evolving standards," we explained that Bell Atlantic "must show that it has deployed the necessary systems and that these systems are operationally ready."[20]

In accord with customary Board practice, in this docket we place the burden of establishing a *prima facie* case on the utility.[21] Having carried this burden with credible evidence, Bell Atlantic could receive a favorable decision. Thereafter, to the extent that the DPS or other parties present credible evidence to the contrary, the burden of persuasion shifts back to Bell Atlantic.[22]

For each checklist item, Bell Atlantic must show that it furnishes, or is ready to furnish, the described item as a practical matter. In situations where no actual commercial usage exists,

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InterLATA Services in Louisiana, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 998-271, rel. October 13, 1998 (*"Bell South Louisiana II Order") at* ¶ 361.

[17] Docket 5936, Order of 9/12/97 at 3.

[18] *Id.* at 7. This is not the standard that the FCC has employed in Section 271 reviews. When seeking relief under Sectio 271, Bell Atlantic may not be able to use both the SGAT and the inter connection agreements to demonstrate compliance with the Checklist.

[19] Docket 5936, Order of 6/4/98 at 2, Order of 1/5/98 at 5.

[20] Docket 5936, Order of 1/5/98 at 4.

[21] This is consistent with the FCC's practice of placing the burden of proof in Section 271 cases upon the Bell Operating Company. *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, Memorandum Opinion and Order, *("Ameritech Michigan* Order") 12 FCC Rcd 20543, 20568 (1997); *Bell South Louisiana II Order*, at ¶ 51.

[22] Docket 5634, Order of 7/14/93 at 31-32; *see also* Docket 5132 (Seabrook), Order of 5/15/87 at 79-89.

any carrier-to-carrier testing, independent third-party testing, and internal testing may be considered.[23]

The Board's merger decision was issued in February, 1996, and the compliance date was September 30, 1997. Thereafter, the FCC's interpretation of the Competitive Checklist has evolved significantly. In this decision, we have attempted to apply current standards, as defined by FCC decisions, even though in some cases the current definition is more rigorous than the standards applicable in 1997. We have pursued this course so that this review will align as much as possible with the standards that ultimately will apply when Bell Atlantic applies for relief in Docket 5936 for relief under Section 271. As a result, Bell Atlantic's policies and procedures are here required to comply with an evolving and increasingly rigorous standard.

Recently the United States Supreme Court held that the Telecommunications Act gives the FCC authority to adopt rules relating to the Act's local competition provisions.[24] These rules may cover the pricing standards that Section 251 of the Act applies to interconnection and unbundled elements. The FCC rules for Section 251 are incorporated by reference into several items of the Competitive Checklist. Therefore, any FCC rules under Section 251 are also likely to apply to Section 271.

The current version of FCC pricing rules requires the use of "Total Element Long Run Incremental Cost" ("TELRIC") methodology in setting prices. The Supreme Court's decision makes it likely that the pricing components of the Competitive Checklist ultimately will include a requirement for TELRIC pricing of several checklist items.

In Vermont, Bell Atlantic asserts that many of the services offered through its SGAT were priced using a forward-looking methodology. Those pricing decisions are under review in Docket 5713. For this reason, there would be little point to considering the same issues here. Instead, any questions related to Bell Atlantic's compliance with the pricing policy must await final resolution in Docket 5713. Our review of pricing issues here is cursory only. Therefore, any conclusions reached here that Bell Atlantic has complied with the Competitive Checklist assume that SGAT pricing will subsequently be approved.[25]

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[23] *Bell South Louisiana II Order* at ¶ 56.

[24] *AT&T Corporation v. Iowa Utilities Bd.*, 119 S.Ct. 721 (January 25, 1999) ("*AT&T v. Iowa*").

[25] Any compliance issues related to pricing can also be enforced in Docket 5713.

The fundamental issue here is whether Bell Atlantic is making adequate provision for its local exchange competitors. We encountered two significant limitations in our examination of this question. First, the record here contains evidence solely from Bell Atlantic and from the DPS. None of Bell Atlantic's competitors participated, even though the issues involved are intimately related to CLEC operations. This topic is enormously complex, but it becomes only more difficult when Bell Atlantic's competitors, who are using Bell Atlantic's facilities and reselling Bell Atlantic's services, are not available to offer evidence and advice. The DPS did make a significant effort to challenge Bell Atlantic on four of the most important of the 14 criteria. Nevertheless, the DPS is not a competitor of Bell Atlantic, and its understanding of the needs of a CLEC cannot be as sharply focused as that of a CLEC itself. We note that before inter-LATA relief is granted to Bell Atlantic, it will be highly desirable to receive evidence from a larger number of parties, including CLECs.

Second, the analysis offered by the parties was limited. We had previously ruled that Bell Atlantic could show compliance either through interconnection agreements or the SGAT. However, neither party offered detailed testimony about interconnection agreements.[26] Bell Atlantic presented its case in chief primarily in terms of the SGAT.[27] Likewise, although the DPS testimony was limited to analysis of the characteristics of the SGAT, its expert witness did not review individual interconnection agreements between Bell Atlantic and CLECs.[28]

This decision by the parties to overlook interconnection agreements creates a possibility that the disputes resolved here lack commercial significance.[29] Many of the problems identified by the DPS may simply be limited to the SGAT, and may not apply to carriers with interconnection agreements.

The Telecommunications Act of 1996 creates a unique commercial relationship among competitors and a heavy regulatory burden for the Board. Bell Atlantic is required by law to lease its network to CLECs and also to sell its services at a discount to those same CLECs for resale. This kind of wholesale relationship is uncommon, possibly unprecedented, in other industries. It

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[26] At the time of hearings, three interconnection agreements existed, although many more exist at the present time. As of September 30, 1997, no CLECs were relying upon the SGAT. Tr. 6/17/98 at 17 (Raymond).

[27] *E.g.*, Chu pf. at 14 (unbundled network elements available under SGAT).

[28] Tr. 6/17/98 at 72 (Raymond).

[29] Many approved interconnection agreements, likewise, lack commercial significance because no services are presently being sold under their terms.

also is a complex relationship, and one subject to continually evolving industry and regulatory standards. The length of this recommended decision, and the number of issues discussed in it, illustrate the complexity of maintaining that wholesale relationship on a satisfactory footing.

The Telecommunications Act of 1996 is viewed in many quarters as "deregulatory." That may be true in some important ways, but it most certainly is not true in the context of wholesale transactions. The Act involves the Public Service Board in supervision of the details of hundreds of aspects of the commercial transactions between CLECs and incumbent carriers.

Findings and Conclusions

Criterion One - Interconnection

Legal Standard

Interconnection allows a CLEC to link its network to Bell Atlantic's network for the mutual exchange of traffic. Interconnection is necessary so that local exchange customers served by one company are able to call customers served by a different company.

Bell Atlantic must provide or generally offer access or interconnection.[30] Interconnection must be provided in a manner that is consistent with the Act's provisions for negotiating and seeking approval of interconnection agreements. Bell Atlantic must make a legal commitment to interconnect with requesting CLECs.[31]

One such requirement is that interconnection be available at any technically feasible point on that network.[32] Moreover, competing carriers may choose any technically feasible method of interconnection at a particular point.[33]

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[30] 47 U.S.C. § 271(c)(2)(B)(i).

[31] *Bell South Louisiana II Order* at ¶ 69 (SGAT's "lack of binding provisions regarding the terms and conditions for collocation deprives us of any basis for finding that [company was] offering collocation on rates, terms, and conditions that are just, reasonable, and nondiscriminatory").

[32] 47 U.S.C. §§ 251(c)(2), 271(c)(2)(B)(i). At a minimum, interconnection must be provided at: (i) the line-side of a local switch; (ii) the trunk-side of a local switch; (iii) the trunk interconnection points for a tandem switch; (iv) central office cross-connect points; (v) out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and (vi) the points of access to unbundled network elements. 47 CFR § 51.305(a)(2); *see also, Implementation of Local Competition Provisions of the Telecommunications Act of 1996,* First Report and Order *("Local Competition First Report and Order*"), 11 FCC Rcd 15499 (1996) at ¶ 209.

[33] *Local Competition First Report and Order* at ¶ 549.

To enable interconnection, Bell Atlantic must allow collocation of a competitor's facilities. In particular, Bell Atlantic must provide "physical collocation" of equipment necessary for interconnection wherever practicable. Nevertheless, if Bell Atlantic can demonstrate that physical collocation is not practical for technical reasons or because of space limitations,[34] it must nevertheless provide "virtual" collocation of interconnection equipment; and it must also make available "meet point" interconnection arrangements.[35] Bell Atlantic must also process and implement requests for collocation within a reasonable time,[36] and must define reasonable collocation intervals in its SGAT.[37]

Interconnection must be of a quality that is at least equal to that which Bell Atlantic provides itself, a subsidiary, or any other party.[38] This requires that interconnection facilities to meet the same technical criteria and service standards, such as probability of blocking in peak hours and transmission standards, that are used for Bell Atlantic's own interoffice trunks.[39] In addition, Bell Atlantic must offer comparable call completion rates for calls terminating with a competing LEC's customers,[40] and it must accommodate a competitor's request for two-way trunking where technically feasible.[41] Bell Atlantic must design its "interconnection facilities to meet the same technical criteria and service standards, such as probability of blocking in peak hours and transmission standards, that are used [for the interoffice trunks] within [Bell Atlantic's

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[34] The incumbent LEC must submit to the state commission detailed floor plans or diagrams of any premises where it claims that physical collocation is not practical because of space limitations. 47 C.F.R. § 51.321(f); *Local Competition First Report and Order* at ¶ 602.

[35] 47 U.S.C. § 251(c)(6); 47 C.F.R. § 51.321. Under a physical collocation arrangement, an interconnecting carrier has physical access to space in the LEC central office to install, maintain, and repair its transmission equipment. Under a virtual collocation arrangement, interconnectors are allowed to designate central office transmission equipment dedicated to their use, as well as to monitor and control their circuits terminating in the LEC central office. Interconnectors, however, do not pay for the incumbent's floor space under virtual collocation arrangements and have no right to enter the LEC central office. *Local Competition First Report and Order* at ¶553.

[36] *Application by BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina*, Memorandum Opinion and Order *("BellSouth South Carolina Order*") at ¶¶ 200-02, 13 FCC Rcd 539 (1998).

[37] *Bell South Louisiana II Order* at ¶¶ 70-72.

[38] 47 U.S.C. §§ 251(c)(2), 271(c)(2)(B)(i); *Local Competition First Report and Order* at ¶ 224.

[39] 47 C.F.R. § 51.305(a)(3); *Local Competition First Report and Order* at ¶ 224; *see also Ameritech Michigan Order* at ¶ 255.

[40] *See Ameritech Michigan Order* at ¶ 235.

[41] 47 C.F.R. § 51.305(f); *Local Competition First Report and Order* at ¶ 219.

own network.]"[42] The obligation to provide equal quality is not limited to service quality perceived by end users, but it includes service quality as perceived by the requesting telecommunications carrier.[43]

Interconnection must be provided on rates, terms, and conditions that are "just, reasonable, and nondiscriminatory."[44] Bell Atlantic must provide interconnection to a competitor in a manner that is no less efficient than the way in which the incumbent LEC provides the comparable function to itself.[45] Bell Atlantic must ensure that a competing carrier has sufficient information about Bell Atlantic's network to remedy network blockage that occurs within Bell Atlantic's network, but that affects both Bell Atlantic's customers and the competing carrier's customers.[46] Finally, rates must be based on cost and be nondiscriminatory, although they may include a reasonable profit.[47]

In evaluating whether Bell Atlantic has met interconnection standards with regard to timeliness, quality and accuracy, the Board may consider performance measurements regarding Bell Atlantic's provision of interconnection trunks (installation of new trunks and augmentations to existing trunk groups) and collocation arrangements (physical and virtual). Knowing the length of time required for the provisioning of both physical and virtual collocation is useful in determining compliance with Bell Atlantic's collocation obligations.[48]

Establishing appropriate trunking architecture and proper interconnection arrangements is the responsibility of both Bell Atlantic and competing carriers.[49]

General Findings

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[42] *Local Competition First Report and Order*, 11 FCC Rcd at 15614-15; *see also* 47 C.F.R. § 51.305(a)(3); *Ameritech Michigan Order*, 12 FCC Rcd 20678-79; *Bell South Louisiana II Order* at ¶ 77.

[43] 47 C.F.R. § 51.305(a)(3); *Local Competition First Report and Order* at ¶ 224.

[44] 47 U.S.C. §§ 251(c)(2), 271(c)(2)(B)(I).

[45] *Local Competition First Report and Order*, 11 FCC Rcd at 15612.

[46] *Ameritech Michigan Order* at ¶ 246.

[47] 47 U.S.C. §§ 252(d)(1)

[48] *Cf. BellSouth South Carolina Order*, 13 FCC Rcd at 649-51 (concluding BellSouth failed to demonstrate it can provision collocation in a timely manner).

[49] *Ameritech Michigan Order* at ¶ 246.

1. On July 31, 1997, Bell Atlantic filed a Statement of Generally Available Terms ("SGAT"). The SGAT sets forth, among other things, the terms and conditions for purchase of interconnection, unbundled network elements, and resale. Chu pf. at 1-2.

2. An SGAT will support competitive entry into local exchange markets, especially entry by smaller carriers and niche carriers. The SGAT will provide a convenient means for all potential entrants to obtain full knowledge of the standing price for unbundled elements because they will not have to conduct extensive research or engage in an expensive negotiation that provides Bell Atlantic with an opportunity to "size-up" them up as competitors. The experiences of carriers in New York and Massachusetts demonstrate that wholesale tariffs, if they afford fair treatment of CLECs, can streamline the process by which CLECs can obtain interconnection and unbundled service from the incumbent LEC. Raymond pf. at 3.

3. By June, 1998, Bell Atlantic had more than a hundred interconnection agreements with CLECs in all of the states that it serves. Tr. 6/18/98 at 67 (Chu).

4. CLECs seeking interconnection with Bell Atlantic must complete a standardized access service request ("ASR"). This can be done electronically or through facsimile transmittal. The ASR is reviewed by Bell Atlantic personnel, and, if complete and accurate, is entered into Bell Atlantic's Operations Support System ("OSS"), and a Firm Order Confirmation is returned to the CLEC. Applications are processed on a first-come, first-served basis. Chu pf. at 9-10.

5. As described in the SGAT, Bell Atlantic offers interconnection through physical or virtual collocation. Chu pf. at 5-6.

6. Under its SGAT, Bell Atlantic provides physical interconnection at the five points that the FCC determined were technically feasible. These are:

- the line side of the end office switch ("Meet Point C" in the SGAT);
- the trunk side of the end office switch ("Meet Point A" in the SGAT);
- the trunk side of the tandem switch ("Meet Point B" in the SGAT);
- central office cross connect points; and
- out-of-band signaling points.

Chu pf. at 4.

7. Interconnections on the line side of the switch require assignment of a telephone number. Chu reb. pf. at 10.

8. The SGAT contains a provision by which a competitor can obtain physical interconnection arrangements that evolve over time, without initiating negotiation of a new interconnection agreement. Specifically, section 16.0 of the SGAT describes a process by which Bell Atlantic determines the technical feasibility and costs for alternative interconnection arrangements. Chu pf. at 5-6.

9. Most of the prices for physical interconnection under the SGAT are in accord with a "TELRIC" cost study filed with the Board on July 31, 1997, in Docket 5713, Phase II B. That docket is evaluating the TELRIC prices so filed. Charges for completing toll calls will be the applicable carrier access rates. Chu pf. at 8-9.

10. Virtual collocation is provided at a carrier's request, where technically feasible. Virtual collocation means that Bell Atlantic will own and operate transmission equipment in its central office that is dedicated to the competing LEC. Ordering for virtual collocation is similar to physical collocation. Bell Atlantic is responsible for equipment maintenance, as directed by the CLEC. The CLEC is responsible for remote monitoring and testing. Chu pf. at 5-6, 12-13.

11. Communications with CLECs concerning interconnection issues are handled by a Bell Atlantic Telecom Industry Services Operations Center ("TISOC"). The TISOC is also responsible for maintenance activities related to interconnection, including assurance that maintenance of interconnection arrangements facilities is at parity with Bell Atlantic's own facilities and equipment. Chu pf. at 9-10.

12. Addition of new trunk groups (initial orders) of 1 to 240 trunks is accomplished within 60 business days. Requests for additional trunks (to existing trunk groups) from 1 to 96 trunk groups have an installation interval of 30 days. Established trunking for CLECs is evaluated using the same criteria to judge the adequacy of facilities that Bell Atlantic uses on its own internal trunking arrangements. Chu pf. at 10.

13. As of September 30, 1997, Bell Atlantic had three interconnection agreements with competitive carriers: Hyperion, C-TEC, Inc., and KMC Telecom. In addition, wireless agreements were in place with Bell Atlantic Mobile, Atlantic Cellular, U.S. Cellular, Sprint PCS and AT&T Wireless. Chu pf. at 14-15; tr 6/17/98 at 18 (Raymond).

14. As of September 30, 1997, Bell Atlantic's interconnection with Hyperion Telecommunications of Vermont, Inc. ("Hyperion") consisted of seven trunk groups with twenty-two DS1 lines. Chu pf. at 13.

15. As of June 15, 1998, Hyperion had physically collocated in five of Bell Atlantic's central offices. Chu reb. pf. at 2-5.

16. As of September 30, 1997, no requests for virtual collocation had been made to Bell Atlantic. Chu reb. pf. at 11.

Discussion

The DPS contends that Bell Atlantic fails in numerous ways to meet the requirements of the Competitive Checklist with regard to interconnection.

Facility Inspection

Initially, the DPS challenges Bell Atlantic's practice of performing a facility inspection for each interconnection request. The DPS contends that inspection is unnecessary and causes competitive harm. The DPS argues that pre-interconnection inspections could easily produce a database that could avoid the automatic need for individualized pre-interconnection surveys at particular sites.[50] Since regular inspection of central offices is already required for fire and safety purposes, the DPS suggests that such inspections could also produce the data needed for interconnection. CLECs could then, the DPS asserts, retrieve the necessary information through the interface to Bell Atlantic's operations support systems at the cost of a single database retrieval.

Findings

17. To determine whether to approve a request for physical collocation, Bell Atlantic conducts an application review, an engineering review, an engineering record search and site survey, and a facilities inspection at the requested central office location. Each application is unique because of the variations in equipment needed by the CLEC and in part due to undocumented variations in central offices. Chu reb. pf. at 3-5.

18. When a CLEC makes a request for physical interconnection, an engineering team surveys the site within five days. The team surveys floor space, cable vaults, cable ducts and power availability. Each request requires a particularized inspection designed to meet the equipment needs of the requestor. If the request can be met, Bell Atlantic notifies the requestor of the results within eight business days. After the initial survey, the requestor can then either proceed or withdraw the application. Chu pf. at 11-12; Chu reb. pf. at 3.

19. Regular inspection of Bell Atlantic wire centers is required for fire and safety purposes. Raymond pf. at 3; tr. 6/18/98 at 54 (Chu).

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[50] Tr. 6/17/98 at 123 (Raymond).

Discussion

We conclude that it is reasonable for Bell Atlantic to conduct a request-specific investigation preceding physical collocation. While inspections are indeed made for other purposes, it is not clear that a routine inspection for fire safety would produce information that would be of significant use for the planning of physical CLEC collocation. The technical issues involved in planning trunk locations and power supplies are likely to be quite different than those in issue during a fire safety inspection. Moreover, the needs of collocating CLECs will differ, depending upon the equipment to be installed, and it does not seem that a generic advance inspection would be sufficient.

We also agree that Bell Atlantic has no obligation under the Act to "prequalify" facilities for collocation.[51] At the same time, the DPS accurately observes that there is ample space in many of Bell Atlantic's central offices. The compactness of modern telecommunications equipment has left some of Bell Atlantic's central offices with much unused space. It does not seem unreasonably burdensome to require Bell Atlantic to survey in advance, and to disclose to CLECs, which central offices clearly have sufficient space for collocation cages. In many central offices it may be possible to make this determination without even visiting the site. We recommend that the Board require Bell Atlantic to prepare a list showing the approximate square footage in each central office that is unoccupied and that could support physical collocation by CLECs. We further recommend that the Board require Bell Atlantic to make this list available to CLECs upon request and to file a copy at the Board.

Deposit for Interconnection

The DPS also objects that Bell Atlantic's deposit requirements for a pre-interconnection investigation are excessive and burdensome. In particular, it challenges the requirement of a 25 percent advance deposit. The DPS also challenged the pricing of collocation, asserting that the prices or practices for collocation do not reflect process re-engineering improvements and enhancements to productivity that were promised in earlier dockets.

Findings

20. Under the SGAT, a CLEC is charged $16,865.00 for conditioning the space for 100 square feet of a physical collocation node. Exh. Board-C-1, § 4.7.3.8 (1).

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[51] Chu reb. pf. at 4.

21. Under the SGAT, to determine the availability of physical collocation space, a CLEC must deposit 25 percent of the anticipated nonrecurring charges. This charge can amount to as much as $4,768. On one occasion in another Bell Atlantic state, an investigation produced a bill of $13,000. Raymond pf. at 4-5; Chu reb. pf. at 3; tr. 6/17/98 at 123 (Raymond).

22. The estimated costs and savings from process re-engineering were reflected in advance in rates through a five-year amortization. Tr. 6/17/98 at 20, 21 (Raymond).

23. No competitor has complained about the advance deposit requirement. Chu reb. pf. at 3.

Discussion

The evidence presented by the DPS does not persuade us that the price of a Bell Atlantic site investigation set out in the SGAT is excessive and burdensome. The DPS presented no data on whether the costs for a reasonable site investigation are significantly lower than the SGAT price, nor on whether prices in other states are generally lower. Nor was evidence offered to show that the 25 percent deposit exceeds Bell Atlantic's costs or created a competitive barrier.

Similarly, the DPS has not established any basis for its somewhat vague charge that interconnection prices in the SGAT fail to reflect cost savings from process re-engineering. The DPS has not offered any detailed evidence concerning the magnitude of the promised savings, whether the promised savings were achieved, nor if achieved whether they were reflected in the deposit requirements. On the contrary, the DPS admitted that the estimated savings from process re-engineering were reflected in advance in rate reductions through a five-year amortization.

Based upon the record before us, we are unable to find objectionable an advance 25 percent deposit of otherwise reasonable nonrecurring changes.

Return of Deposit

The DPS also criticizes Bell Atlantic's practice of failing to return the entire collocation deposit if Bell Atlantic's investigation demonstrates that physical collocation is not practicable.

Findings

24. After the initial survey by Bell Atlantic, if the requestor withdraws its application for physical collocation, the balance of the application fee is refunded. The costs of engineering search and physical inspection, as well as some administrative activities, are retained by Bell Atlantic. Raymond pf. at 5; Chu reb. pf. at 3.

Discussion

We agree with the DPS that Bell Atlantic's practice of retaining funds after rejecting an application is unreasonable. Thorough investigation of some potential collocation sites may indeed be expensive. In most cases, however, a lack of space for collocation should be readily apparent, and Bell Atlantic's costs should be minimal.

More fundamentally, we conclude that the practice of keeping a portion of the deposit when service cannot be provided is commercially extraordinary and therefore unreasonable. There are few, if any, competitive enterprises that will charge a customer for determining that it cannot meet the customer's needs. We recommend that the Board require Bell Atlantic to amend the SGAT so that the CLEC's full deposit is returned if space is not available.

Denial of Physical Collocation

The DPS criticizes Bell Atlantic's claim that it may under some circumstances deny physical collocation to a CLEC.

Findings

25. Under the SGAT, Bell Atlantic reserves the right to refuse space for physical collocation. Raymond pf. at 10.

26. As of June 15, 1998, no carriers had filed complaints with Bell Atlantic concerning denial of collocation. Chu reb. pf at 5.

Discussion

We conclude that reserving the right to refuse space for physical collocation does not on its face violate the requirements of the Competitive Checklist. Indeed, under the terms of the Act itself, if Bell Atlantic can demonstrate that physical collocation is not practical for technical reasons or because of space limitations, it may provide "virtual" collocation of interconnection equipment; and it must also in that case make available "meet point" interconnection arrangements.[52]

Moreover, there is no evidentiary basis to conclude that any party has in fact been denied physical collocation. We note, however, that Bell Atlantic cannot arbitrarily decide to refuse space; nor can Bell Atlantic apply the provisions of the SGAT in a discriminatory manner. We

[52] 47 U.S.C. § 251(c)(6); 47 C.F.R. § 51.321.

expect that any refusal of the right to physical collocation space will be consistent with the Act, and thus only when it is "not practical for technical reasons or because of space limitations."[53]

Individual Cost Basis Pricing

The DPS objects that virtual collocation is available only on an individual case basis ("ICB"), with no commitments for turnaround times, estimated costs for surveys, or other expenses. The DPS alleges that this is unreasonably discriminatory.

Findings

27. Under the SGAT, virtual collocation is available only on an individual case basis. The SGAT does not contain any commitments for turnaround times, estimated costs for surveys, or other expenses. Raymond pf. at 10.

Discussion

At the time the record closed, no CLEC had made a request for virtual collocation. This absence of demand may be the result of CLEC uncertainty. If the price is unknown and the rules are undefined, any CLEC would be cautious in seeking virtual collocation. On the other hand, the absence of demand may be the result of a number of other factors, including the requirements of the Act, conclusions that virtual collocation has little incremental value over physical collocation,[54] or even the fact that there are still few competitors in Vermont.

As we noted above, no CLECs are parties to this proceeding. This makes it difficult to determine whether a Board mandate in favor of developing virtual collocation would be of practical benefit to any CLECs.[55] It may be that in Docket 5936, when Bell Atlantic finally goes forward with an effort to seek inter-LATA authority, the participation of CLECs could provide this important information.

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[53] 47 U.S.C. § 251(c)(6).

[54] One CLEC advocacy group is encouraging state commissions to develop alternatives to both physical collocation and traditional virtual collocation, and recommends adoption of "shared space cageless collocation" and "common space cageless collocation. "Shared space cageless collocation" is physical collocation where all CLECs share a portion of the central office, but that space is separated from the ILEC's facilities. "Common space cageless collocation" allows CLECS to install equipment in the ILEC's central office with some physical separation from ILEC equipment, but without the use of a cage. *See*, Competitive Telecommunications Association, *Uncaging Competition: Reforming Collocation for the 21st Century*, September, 1998, at 28.

[55] We note with approval Bell Atlantic's stated intention to prepare a TELRIC study of virtual collocation costs when it receives a request for virtual collocation.

The FCC has rejected an application under section 271 because it did not state a price for preparing a space for physical collocation.[56] No such FCC precedent exists as to virtual collocation.

We reject the DPS view that the absence of advance pricing information concerning virtual collocation is discriminatory on its face. We reach this conclusion in part because the Act gives first preference to physical collocation (which Bell Atlantic provides), requiring virtual collocation only when physical collocation is "not practical for technical reasons or because of space limitations."[57] We also rely upon the lack of evidence establishing a commercial need for virtual collocation. Thus, for purposes of assessing Bell Atlantic's compliance with the merger condition, we conclude that ICB pricing of virtual collocation is adequate. However, if demand for virtual collocation increases so that the absence of wholesale rates is in fact impeding competitive entry, it may be necessary to require Bell Atlantic to set prices in the SGAT.

Competitively Sensitive Information

The DPS also observes that the requirement for a pre-interconnection inspection provides information to Bell Atlantic about the requesting CLEC's plans. By requiring a pre-interconnection investigation at each proposed interconnection site, the DPS maintains that CLECs are improperly required to "tip their hand" by disclosing the wire centers in which they intend to collocate.

The DPS contends that the protections of federal law, including 47 U.S.C. § 222, are not sufficient to protect the interests of CLECs since there are many opportunities for improper informal communication.[58] As the DPS notes, this organizational separation could be defeated, for example, through transfer of employees within Bell Atlantic.

Findings

28. When a CLEC notifies Bell Atlantic that it seeks physical collocation, it is likely that at least 60 days will expire before the CLEC is ready to provide service from that location. Tr. 6/17/98 at 25 (Raymond).

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[56] *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina*, Memorandum Opinion and Order, 13 FCC Rcd 539, 651-53 (1997) (*BellSouth South Carolina Order*).

[57] 47 U.S.C. § 251(c)(6).

[58] Tr. 6/17/98 at 115-16 (Raymond).

29. During any period of 60 days, an incumbent LEC could engage in aggressive marketing in an area where collocation is planned. This pattern of behavior actually has occurred in the Syracuse area, an area served by a Bell Atlantic affiliate company. Tr. 6/17/98 at 30 (Raymond).

30. When a CLEC orders collocation, the order comes through a Telecommunications Industry Services Operations Center ("TISOC"), a separate marketing group that only markets to account competitive providers. Bell Atlantic's collocation process ensure that such requests are not made available to retail employees. Tr. 6/18/98 at 75 (Chu); Chu reb. pf. at 10.

31. As of September 30, 1997, Bell Atlantic had established a separate department to service competing carriers' requests for interconnection and access to network elements. A request for interconnection is referred to a separate group that takes all requests from inside Bell Atlantic and outside Bell Atlantic. Electronic "fire walls" ensure that retail employees cannot see the accounts of resellers. Chu reb. pf. at 8; tr. 6/18/98 at 76 (Chu).

Discussion

This is the first of several areas where the DPS criticizes possible inappropriate use of information that Bell Atlantic receives from CLECs. In each case the DPS argues the information could provide a competitive advantage to Bell Atlantic.

The nature of the relationship between incumbents and CLECs is an important factor here. The relationship between CLECs and Bell Atlantic is a bilateral business relationship. Even though Bell Atlantic is in a more powerful position on many issues, the parties nevertheless need to maintain this bilateral relationship. At the same time, the CLECs and Bell Atlantic compete against one another.

Specifically, CLECs, which are required to disclose their intention to interconnect, have an interest in receiving a prompt and accurate statement from Bell Atlantic of whether interconnection is available and, if so, at what cost. CLECs also have an interest in preventing Bell Atlantic from using the information inappropriately to their competitive disadvantage. As the DPS correctly notes, information provided by a CLEC in an application for a pre-collocation investigation could be commercially useful for Bell Atlantic. As the DPS requested, we found that Bell Atlantic would have more than 60 days, in most cases, before the CLEC's new service, based upon collocation, would become available. This could offer Bell Atlantic an extended period to respond competitively. We agree with the DPS that during this period Bell Atlantic

could engage in aggressive marketing and sales in the affected area, such as by offering special contracts to commercial customers not already under contract, special promotions for high usage residential customers, and an aggressive outbound telemarketing effort to lock up toll agreements.[59] There is evidence that such abuses have occurred in another Bell Atlantic state.

For its part, Bell Atlantic also has a legitimate interest in knowing how much demand each CLEC will impose on its systems and facilities.[60] This allows Bell Atlantic to manage the facilities on which it and it's competitors both rely and to effectively place new capital investment. A CLEC that does not provide complete information about its collocation needs might not receive adequate support, and the problem could conceivably even affect Bell Atlantic's own operations. This in turn could decrease Bell Atlantic's ability to provide for all of the customers receiving services from its network, including customers of other CLECs.

Given these competing interests, we find no basis on which to bar Bell Atlantic from requiring CLECs to submit information in collocation requests. As we have stated, Bell Atlantic needs this information to make collocation space available for CLECs. We cannot see how the level of prophylaxis desired by the Department could coexist with effective communication between Bell Atlantic and the CLECs.

These competing interests must also be considered when evaluating the systems established by Bell Atlantic to protect the confidentiality of that information. Bell Atlantic should be required to show that it has taken reasonable precautions to protect CLEC information. Bell Atlantic is not required to show that it has precluded all possible misuse of CLEC information, however speculative. The relevant legal inquiry is whether reasonable safeguards exist to ensure that Bell Atlantic does not use information acquired as a wholesale provider in aiding its own retail endeavors.

Congress recognized CLEC interests when it enacted Section 222 of the Act. This section generally imposes a duty on incumbents like Bell Atlantic to protect confidential information received from a variety of sources, including other carriers and resellers.[61] More specifically, it also protects "proprietary information" received from other carriers, and specifically proscribes

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[59] Tr. 6/17/98 at 25 (Raymond).

[60] Tr. 6/17/98 at 184 (DeVito).

[61] 47 U.S.C. § 222(a).

use of such information for marketing purposes.[62] Information about prospective locations for collocation and UNE purchase would generally fall within this category of protected information.

We conclude that Bell Atlantic has made reasonable accommodations to insulate CLECs from the competitive disadvantage that would follow giving Bell Atlantic's non-wholesale employees access to information about CLEC collocation plans. Bell Atlantic has made significant organizational changes to comply with Section 222 of the Act, including establishing an "electronic fire wall" between its retail and wholesale employees. The DPS has not shown that confidential information has been or is likely to be used in an improper manner.[63] Based upon the present record, improper use of that information, while possible, is speculative. We conclude that Bell Atlantic has shown that the systems it has established are sufficient to comply with Section 222 of the Act and, thereby, the merger conditions.[64]

In reaching this conclusion, we note that it is no secret which wire centers in Vermont serve major business customers and high density areas, and we presume that Bell Atlantic and CLECs are already behaving as though competitors could, on fairly short notice, take over virtually any of Bell Atlantic's premium local exchange accounts.[65]

Finally, even if the Board were to take some action to further insulate information about CLEC plans, we doubt that action would be effective at maintaining the confidentiality sought by the DPS. A knowledgeable Bell Atlantic employee could well infer a large part of a CLEC's facilities play just by observing the CLEC's existing cable runs on poles and its construction work in progress, and CLEC facilities plans are available in a variety of other contexts, including E-911 planning documents.

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[62] Section 222(b) of the Act provides:

> (b) CONFIDENTIALITY OF CARRIER INFORMATION.--A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

47 U.S.C. § 222(b); *see also* Chu reb. pf. at 5.

[63] Tr. 6/17/98 at 26 (Raymond).

[64] It is possible, as suggested by the DPS, that those safeguards will prove inadequate. Under facts not presented here, it may appear in the future that the Board should take further action or require the establishment of additional safeguards. This is particularly so since it is not clear what remedies exist for violation of Bell Atlantic's duties under section 222.

[65] See, tr. 6/17/98 at 22 (Raymond) (marketing strategies of existing Vermont CLECs are not "mysterious").

Conclusion

Upon meeting the conditions set out below, Bell Atlantic has met its burden of demonstrating compliance, as of September 30, 1997, with Competitive Checklist item I.

(1) Bell Atlantic should prepare a list showing the approximate square footage in each central office that is unoccupied and that could support physical collocation by CLECs. Bell Atlantic should file a copy with the Board and make this list available to CLECs upon request.

(2) Bell Atlantic should be required to amend the SGAT so that a CLEC's full deposit is returned if physical collocation space is not available.

Criterion Two, Part A - Network Elements

Legal Standard

"Network elements" are specific segments of the telephone network and are sometimes referred to as "UNEs," or unbundled network elements. They include:

(1) local loops;

(2) network interface devices;

(3) local switching;

(4) interoffice transmission facilities;

(5) signaling networks and call-related databases;

(6) operations support systems; and

(7) operator services and directory assistance.[66]

The Supreme Court has directed the FCC to reexamine this list in light of criteria in the Act.[67] However, since the FCC has not yet conducted that reexamination, we assume that the list stated above defines the applicable standard here. We note that five of seven network elements in the list are separately identified again in subsequent criteria in the Competitive Checklist.[68]

CLECs must be able to provide telecommunications service wholly through the use of unbundled network elements purchased from incumbent LECs.[69] Bell Atlantic must provide or

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[66] 47 C.F.R. § 51.319; *Local Competition First Report and Order* at ¶ 516.

[67] *AT&T v. Iowa*, 119 S.Ct at 734.

[68] These five are: local loops; local switching; interoffice transmission facilities; signaling networks and call-related databases; and operator services and directory assistance.

[69] 47 C.F.R. § 51.315(a); *Local Competition First Report and Order at* ¶ 328-341

generally offer nondiscriminatory access to network elements.[70] UNE access provided by Bell Atlantic to competitors must be substantially the same as Bell Atlantic provides to itself, in terms of timeliness, quality, and accuracy.[71]

Bell Atlantic must also provide UNEs under rates, terms, and conditions that are just, reasonable, and nondiscriminatory.[72] Just and reasonable rates must be based on the cost of providing the network element, must be nondiscriminatory, and may include a reasonable profit.[73]

Bell Atlantic must also provide UNEs at any technically feasible point. In particular, Bell Atlantic must provide collocation of equipment necessary for the CLEC to interconnect UNEs and CLEC facilities.

Findings

32. UNEs are available under the SGAT and at prices set by the SGAT. UNEs are also available under interconnection agreements. Chu pf. at 8, 14-15.

33. Bell Atlantic offers eight UNEs: local loops or "links;" interoffice transmission facilities; local switching; tandem switching; databases and signaling systems; directory assistance and operator services facilities; access to network interface devices; and access to operations support systems. This list matches the requirements of federal law found in 47 CFR § 51.319, and exceeds the list identified in Docket 5713, Phase I. Chu pf. at 14, 16; Raymond pf. at 8.

34. UNE prices were determined by Bell Atlantic's Total Element Long Run Incremental Cost ("TELRIC") study filed on July 31, 1997. The accuracy of this study is being examined in Docket 5713, Phase II. Chu pf. at 8, 17-18.

35. Bell Atlantic did not receive any requests for UNEs prior to September 30, 1997. However, by June, 1998, Bell Atlantic was selling some local loops on a UNE basis each month. Tr. 6/18/98 at 105 (Chu).

36. In 1997, Bell Atlantic-North (Maine through New York) completed 5,900 UNE loop conversions ("hot cuts"), installed 5,500 new UNE loops, and completed 4,500 interim number portability translations. Miller/DeVito pf. at 12.

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[70] 47 U.S.C. §§ 271(c)(2)(B)(ii), 251(c)(3).

[71] *See generally* 47 C.F.R. § 51.311 and 51.313.

[72] 47 U.S.C. § 251(c)(3).

[73] 47 U.S.C. § 252(d)(1).

37. No CLEC complaints had been made regarding network elements as of September 30, 1997. Tr. 6/17/98 at 56 (Raymond).

Discussion

The DPS contends that Bell Atlantic's SGAT has not fulfilled its purpose of allowing *a la carte* selection of services and elements without extensive negotiations, and so fails to provide nondiscriminatory rates because of extensive use of individual case basis pricing.[74] Second, the DPS asserts that the terms and conditions of the SGAT favor Bell Atlantic, do not reflect the commercial realities of the marketplace, and appear intended to "hamstring" CLECs.

Combination of Elements

Findings

38. UNEs are provided on a stand-alone basis. Bell Atlantic does not offer combined UNEs. UNEs are provided in a manner that allows them to be combined, by the CLEC, with each other or with UNEs provided by the CLEC. Chu pf. at 15-17.

Discussion

Bell Atlantic provides its own retail customers a continuous path from their own telephones, through a Bell Atlantic "link" (local loop), to the switch and beyond. If a CLEC wants to lease a customer's link as a UNE, and it also wants to lease a portion of Bell Atlantic's switch associated with that loop as a UNE, Bell Atlantic breaks the two services apart. Bell Atlantic will deliver the link to the CLEC's collocation cage in the form of a pair of wires. Bell Atlantic also will deliver the switch port to the CLEC, in the form of a different pair of wires. The CLEC must then obtain a physical collocation cage in order to attach the two pairs of wires. The effect is to require a CLEC to obtain a collocation cage for its first UNE customer served by a wire center.

If UNEs are to be a viable strategy for CLEC entry, competitors must have access to UNEs in essentially the same form that they are available to Bell Atlantic itself. This is reflected in FCC rules that contain a "no-separation" provision and a "combination" provision. The "no separation" rule first provides that, except upon request of a CLEC, Bell Atlantic must refrain

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[74] Raymond pf. at 8. Analysis of the UNE issue was also made more difficult by the fact that the DPS witness apparently did not reliably differentiate between Section 5 of the SGAT, which deals with UNEs, and Section 6 of the SGAT, which deals with resale. Exh. Board-C-3; Chu reb. pf. at 8-9. The DPS witness had discussed Section 6 of the SGAT in relation to UNEs. Raymond pf. at 9:3. Thus it was not clear in some cases whether the witness intended to criticize Bell Atlantic's UNE policies or its resale policies.

from separating requested network elements that it currently combines.[75] The "combination" provision requires Bell Atlantic to perform the functions necessary to combine unbundled network elements in a manner that is technically feasible and would not impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.[76] This recombination may be required even if those elements are not ordinarily combined in [Bell Atlantic's] network[77] or if some of the UNEs are provided by the CLEC.[78]

When the hearings occurred in this docket, in June, 1998, these FCC rules had been stayed by an appellate court.[79] The FCC rules were recently reinstated, however, by the United States Supreme Court. The Court concluded that the Act:

> does not say, or even remotely imply, that elements must be provided only in [separated] fashion and never in combined form. Nor are we persuaded by the incumbents' insistence that the phrase "on an unbundled basis" in § 251(c)(3) means "physically separated." The dictionary definition of "unbundled" (and the only definition given, we might add) matches the FCC's interpretation of the word: "to give separate prices for equipment and supporting services." Webster's Ninth New Collegiate Dictionary 1283 (1985).[80]

Now that the FCC's rule has been reaffirmed, all incumbent local exchange carriers, including Bell Atlantic, must comply with them, and they have become a part of the Competitive Checklist.[81] Insofar as the SGAT authorizes Bell Atlantic to separate UNEs, and insofar as it does not provide for recombination, it violates FCC rules and therefore does not satisfy the Competitive Checklist. We recommend that Bell Atlantic be required to file amendments to its

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[75] 47 C.F.R. §51.315 (b).

[76] 47 C.F.R. §51.315 (c).

[77] 47 C.F.R. §51.315 (c).

[78] 47 C.F.R. §51.315 (d).

[79] In addition, issues related to recombination of UNE's were under review in Docket 5713.

[80] AT&T v. Iowa, 119 S.Ct. 737.

[81] The UNE rules are based upon 47 U.S.C. §§ 251(c)(3) and 252(d)(1), which are incorporated by reference into 47 U.S.C. § 271(c)(2)(B)(ii). Of course, uncertainty in the identity of the UNE elements makes it more difficult to anticipate all of the combinations that may be possible, but this should not prevent Bell Atlantic from filing tariffs allowing, at the least, combinations of the five elements that are listed in section 271.

SGAT under which CLECs may purchase combined UNEs in any manner that is consistent with the FCC's reinstated rules.[82]

Individual Case Basis Installation Schedules and Pricing

The DPS objects that CLECs cannot submit orders in commercially competitive quantities, and that individual case basis ("ICB") does not permit "a la carte" selection of services and elements without extensive negotiations, and thus is discriminatory. The DPS's objection applies both to installation intervals and to pricing.[83]

Findings

39. Installation intervals for ten or more loops on a single premise are negotiated on an individual case basis. Raymond pf. at 10; Chu reb. pf. at 11.

40. Bell Atlantic schedules installation work for UNEs under Section 5 of the SGAT based on Bell Atlantic's retail and carrier access intervals, whichever is appropriate. Chu reb. pf. at 8.

41. Bell Atlantic requires a CLEC desiring to order a switch port to file a "Network Design Request" ("NDR"). This allows Bell Atlantic to assign line class codes and routings in an end office switch before a CLEC places an order for a line port. This is the same process that Bell Atlantic itself uses. Chu reb. pf. at 9.

42. Some UNE prices are negotiated on an individual case basis. These include 45 Mbps links and TR08 ports. Demand for 45 Mbps links and TR08 ports is limited, and neither service is available anywhere in "Bell Atlantic-North" states at a tariffed price. Raymond pf. at 10; Chu reb. pf. at 9; tr. 6/18/98 at 56 (Chu).

Discussion

Bell Atlantic declines to prescribe in advance the installation interval when a CLEC installs 10 or more loops on a single premise. Rather, the installation interval must be negotiated. The DPS also objects that some UNE prices in the SGAT are negotiated on an individual case basis.

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[82] The Board has determined in Docket 5713 that it has authority under state law to require incumbent LECs to offer combined elements. Order of 10/8/98. The Board has not yet ruled in Docket 5713, however, whether that authority should be exercised.

Because this issue arose here as a result of a Supreme Court decision, there is no factual record concerning the technical difficulties, if any, that Bell Atlantic may encounter in complying with the FCC rules. Those issues can be considered, if necessary, in a separate docket after the SGAT amendment has been filed.

[83] Raymond pf. at 8, 10.

At the outset, it is important to note that the ten-loop rule is not an overall limitation on CLEC orders. Rather, it is a limitation on the installation of loops at a single premise. Therefore the rule does not affect any CLEC, regardless of the number of orders it places or the number of customers it proposes to serve, unless it proposes to add 10 or more customers at a single location.

We conclude that there is nothing inherently unreasonable or discriminatory about a size-based limitation. Bell Atlantic should not be expected, for example, to guarantee routine handling of a CLEC order for a hundred new UNE loops at a single location. At some number of lines, special handling by Bell Atlantic, and thus negotiated installation intervals, would be justified.

The record here does not contain a sufficient basis to conclude that the ten-line threshold is too low in fact. Here, Bell Atlantic asserts, and the DPS does not contest, that unusual circumstances often arise for installations of more than ten lines. Therefore we find no basis in the record to conclude that the ten-loop rule is unreasonably discriminatory.

Bell Atlantic also requires a CLEC desiring to order a switch port to file a "Network Design Request" ("NDR"). This allows Bell Atlantic to assign line class codes and routings in an end office switch before a CLEC places an order for a line port. Bell Atlantic uses the same process that Bell Atlantic applies to its own efforts to put a switch into service. We conclude that this practice is not discriminatory.

We also disagree with the DPS concerning whether Bell Atlantic should be required to state prices for all services. As a general rule, the SGAT should contain specific pricing for the services Bell Atlantic offers, and ICB pricing should be extremely limited. This will allow competitors to readily determine the price of UNEs it may want to purchase and will facilitate entry. However, it is also reasonable that some UNEs will have limited demand or will be difficult to price without knowing specific configurations. ICB pricing may be appropriate in these instances. Here, 45 Mbps links and TR08 ports are high capacity services. The record does not support a conclusion that either service is currently in demand in Vermont. We are reluctant to conclude that the SGAT is defective because it requires ICB pricing of these particular services for which there is no evident demand.

Alteration of Telephone Numbers

The DPS contends that under Section 4.2.1.10 of the SGAT, Bell Atlantic can unilaterally alter the telephone numbers that have been made available to CLECs, apparently without advance notice or recourse.[84]

Findings

43. Bell Atlantic offers a type of interconnection service called "Meet Point C" line side interconnection. This type of interconnection requires the assignment of a telephone number because it is a line side connection. The provision does not affect the telephone numbers assigned to CLEC customers. Chu reb. pf. at 10.

Discussion

We conclude that there is no need to change Bell Atlantic's policy in this area. The SGAT does not permit unilateral alteration of consumer telephone numbers that have been made available to CLECs.

Competitively Sensitive Information

The DPS claims that competitively sensitive information obtained in the process of ordering network elements may be used to hinder competition.

Findings

44. As of September 30, 1997, Bell Atlantic had established a separate department to service competing carriers' requests for interconnection and access to network elements. A request for poles, conduits or right-of-way is referred to a separate group that takes all requests from inside Bell Atlantic and outside Bell Atlantic. Electronic "fire walls" ensure that retail employees cannot see the accounts of resellers. Chu reb. pf. at 8; tr. 6/18/98 at 76 (Chu).

Discussion

For the reasons set out above concerning the use of information on CLEC collocation requests, we conclude that Bell Atlantic's procedures for protecting the confidentiality of information obtained while ordering network elements meet the Competitive Checklist. We conclude that Bell Atlantic has made reasonable organizational accommodations to insulate CLECs from the competitive disadvantage arising from improper commercial use of CLEC UNE orders. Based upon the present record, improper use of that information is speculative. As we stated previously, if it appears that Bell Atlantic is using or begins to use information about

[84] Raymond pf. at 10.

competitor requests for UNE's to contact customers or otherwise engage in anti-competitive behavior, it may be necessary to institute further protections.

Conclusion

Upon compliance with the condition set out below, Bell Atlantic has met its burden of demonstrating compliance, as of September 30, 1997, with Competitive Checklist item II. Bell Atlantic should file an amendment to its SGAT under which CLECs may purchase combined UNEs in any manner that is consistent with the FCC's reinstated rules.

Criterion Two, Part B - Operations Support System

Legal Standard

To fulfill the nondiscrimination obligation with regard to unbundled elements, Bell Atlantic must provide access to its operations support systems ("OSS"), meaning the information, systems, and personnel necessary to support the elements and services it must provide to CLECs. The systems, information, and personnel encompassed by OSS are vital to the use of unbundled network elements and the provision of resold services by CLECs. Access to Bell Atlantic's operations support systems provides CLECs with the ability to order service for their customers and allows CLECs to communicate effectively with Bell Atlantic regarding such basic activities as placing orders and providing repair and maintenance service for customers. If a CLEC has access to an OSS that is not the equivalent of the OSS that Bell Atlantic provides to itself, the CLEC will be severely disadvantaged, if not precluded altogether, from fairly competing in the local exchange market.[85]

A competing carrier will utilize the OSS in order to sign up customers, place an order for services or facilities with the incumbent, track the progress of that order to completion, receive relevant billing information from the incumbent, and obtain prompt repair and maintenance services for its customers. In each of these areas Bell Atlantic must show that access and service quality are adequate and equal to that which it provides itself.

In demonstrating that its OSS meets the requirements of law, Bell Atlantic must demonstrate that:

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[85] 47 U.S.C. § 271(c)(2)(B)(ii); *Bell South Louisiana II Order* at ¶ 80.

(1) Bell Atlantic has deployed the necessary systems and personnel to provide CLECs with access to each of the necessary OSS functions.[86]

(2) Bell Atlantic has adequately assisted CLECs in understanding how to implement and use all of the OSS functions available to them.[87]

(3) Bell Atlantic's OSS functions and interfaces are operationally ready[88] and capable of handling current demand as well as reasonably foreseeable demand.[89] While actual commercial usage is the most probative evidence of readiness, carrier-to-carrier testing, independent third-party testing, and internal testing may also be used.[90]

(4) Bell Atlantic provides OSS functions to competitors in substantially the same time and manner that it provides for itself.[91] This can be evaluated through comparative performance data, such as the period required to install a network element, how often the promised installation dates are met, how well the CLEC is informed of the status of its order, and how responsive Bell Atlantic is in providing access to needed support functions.

(5) As to OSS functions that do not have a retail analog, Bell Atlantic must demonstrate that the access it provides CLECs offers an efficient competitor a meaningful opportunity to compete.[92] Actual results are as important as the process used to achieve those results.

An OSS can be implemented in a number of ways. An OSS should be accessible with a minimum of investment by a small competitor. Likewise, it should offer an "application to application" interface for high-volume competitors who want to reduce the work of re-keying data entered into the OSS.

Findings

45. Bell Atlantic had in place an operations support system ("OSS") as of September 30, 1997, and after. Bell Atlantic utilizes the same systems for all "Bell Atlantic North" states, from Maine to New York. DeVito pf. at 2, 4, 7, 13, and 16; DeVito reb. pf. at 1, tr. 6/17/98 at 130 (Raymond).

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[86] *Ameritech Michigan Order* at ¶ 136; *BellSouth South Carolina Order* at ¶ 96.

[87] *Id.*

[88] *Id.*

[89] *Ameritech Michigan Order* at ¶ 138; *BellSouth South Carolina Order* at ¶ 97.

[90] *Ameritech Michigan Order* at ¶ 138.

[91] *Local Competition First Report and Order,* 11 FCC Rcd at ¶ 517; *Ameritech Michigan Order* at ¶ 139, *BellSouth South Carolina Order* at ¶ 98.

[92] *Ameritech Michigan Order* at ¶ 139; *BellSouth South Carolina Order* at ¶ 98.

46. Bell Atlantic provides four classes of functions through its OSS. They are pre-ordering, ordering-provisioning, maintenance and repair, and billing. Miller/DeVito pf. at 2.

47. Bell Atlantic's OSS is available both for resale and to order UNEs. Miller/DeVito pf. at 4.

48. Bell Atlantic's OSS is scheduled to be available 24 hours per day, seven days per week. Tr. 6/17/98 at 174 (DeVito).

49. As of June, 1998, Bell Atlantic's OSS were available 100 percent of the time between the hours of 6 AM and 12 PM Monday through Saturday, and 98.45 percent of the time overall. Tr. 6/18/98 at 28 (Canny).

50. As is also true with interconnection, CLECs requesting UNES contact the Bell Atlantic Telecommunications Industry Service Order Center ("TISOC"). Bell Atlantic's Direct Customer Access Services ("DCAS") system then provides an electronic gateway into various portions of Bell Atlantic's operating systems to facilitate the provisioning, maintenance, and repair of UNEs. Chu pf. at 18.

Software

51. For a CLEC to obtain access to Bell Atlantic's OSS, it must use an interface. Three such interfaces exist, the "EIF", "EDI," and "Web GUI" systems, although not all three are available for all OSS functions. Miller/DeVito pf. at 2-3; tr. 6/17/97 at 163 (DeVito).

52. The three interfaces allow CLECs to obtain access to Bell Atlantic's "back end" systems that it uses for its own customers. Miller/DeVito pf. at 2; tr. 6/17/97 at 144 (DeVito).

53. CLECs are required to provide password authentication before they can use the OSS. This is essential to protect the security and confidentiality of CLEC data, from Bell Atlantic employees, from other CLECs, and from the general public. Password protection also provides other benefits, including the privacy it affords to competitors, the ease of use of a gateway system, and the ability to sign-on only once to gain access to Bell Atlantic's OSS. DeVito reb. pf. at 2; tr. 6/17/97 at 141, 143 (DeVito).

54. The EIF is an application-to-application interface. This means it is designed so that a CLEC's computer systems can transact business directly with Bell Atlantic's OSS through the interchange of structured data files. However, each CLEC must design its own computer systems to operate on its side of the interface. Miller/DeVito pf. at 3; tr. 6/17/97 at 154-58 (DeVito).

55. The Electronic Data Interchange ("EDI") interface is another application to application interface. At the time of hearings, it was based upon a national standard and was offered by Bell Atlantic in versions 6 and 7. Miller/DeVito pf. at 7; tr. 6/17/97 at 154-55 (DeVito).

56. The Web Graphical User Interface ("Web GUI") is available through the Internet's World Wide Web. It is a graphical interface that can be operated by a CLEC employee using a personal computer. It allows a CLEC to interact with Bell Atlantic's OSS without incurring the costs of development and support associated with application-to-application interfaces. The Web GUI is the system most useful to CLECs with small initial volumes of business. It does, however, require the CLEC representative to type in all of the required information manually. Miller/DeVito pf. at 3; tr. 6/17/97 at 149 (DeVito).

57. The OSS systems provide electronic notification of errors made by a submitting CLEC. Some of this checking is to ensure that required data fields are filled in by the CLEC operator. The error notification provided to CLECs is the same as that Bell Atlantic provides to itself. DeVito reb. pf. at 2; tr. 6/17/97 at 143, 150 (DeVito).

58. Bell Atlantic complies with national standards called Local Service Ordering Guidelines ("LSOG"). As of June, 1998, Bell Atlantic used LSOG version 2, and was moving to implement LSOG version 3. Tr. 6/17/98 at 157 (DeVito).

Usage

59. As of September 30, 1997, no Vermont CLECs were using the Bell Atlantic OSS. One CLEC was faxing in orders. Tr. 6/17/98 at 183 (DeVito); Miller/DeVito pf. at 19.

60. As of June, 1998, approximately six carriers were using the OSS. In May, 1998, 145 electronic orders were placed by CLECs for Vermont customers. Tr. 6/17/98 at 20 (Raymond); tr. 6/17/98 at 183, 185 (DeVito); Miller/DeVito pf. at 19.

61. As of February, 1998, throughout the Bell Atlantic-North region:

(A) approximately 40 CLECs were using the Web GUI for pre-order functions;

(B) two carriers were using version 6 of the EDI interface; and

(C) one CLEC was using EIF.

Miller/DeVito pf. at 4, 7.

62. As of September 30, 1997, Bell Atlantic's OSS was able to handle reasonably foreseeable demand volumes for individual checklist items. Tr. 6/17/98 at 171-73 (DeVito).

Pre-Ordering

63. Pre-order functions require a CLEC to retrieve information necessary for effective service order negotiation with an end user customer. When a CLEC makes a pre-order inquiry concerning a possible customer, the OSS provides the CLEC with the customer's account information, including billing name and address, billing and working telephone numbers, a list of all services provided to the customer, and the customer's presubscribed interexchange carrier. In addition, CLECs are offered up to five telephone numbers for selection and reservation, and they may select due dates for customer orders. Miller/DeVito pf. at 3.

64. All pre-ordering functions supported by Bell Atlantic's OSS are made available through a software system gateway known as the "DCAS."[93] Miller/DeVito pf. at 3.

65. After September, 1997, Bell Atlantic added an additional pre-order function. CLECs can now pre-qualify lines for ISDN, and they may view directory listings. They may also access Bell Atlantic's Carrier Access Billing System ("CABS") records. They also may obtain information without knowing in advance the single telephone number considered the primary number for that customer. Miller/DeVito pf. at 3; tr. 6/17/97 at 160 (DeVito).

66. Pre-order functions are available from Bell Atlantic using the EIF and Web GUI formats. The EDI format is not available. Miller/DeVito pf. at 3.

67. CLEC representatives and Bell Atlantic service representatives obtain the same pre-order information from the same underlying Bell Atlantic systems. CLECs may enter orders for their customers in substantially the same time and manner as a Bell Atlantic representative. Miller/DeVito pf. at 3-4.

68. In December, 1997, Bell Atlantic-North received approximately 2,120 pre-order transactions on a daily basis. Independent testing demonstrated a capacity to handle more than 46,000 orders per eight-hour day. Miller/DeVito pf. at 5-6.

69. Average response time for a typical pre-order transaction, seeking a customer service record, is three seconds. Miller/DeVito pf. at 6.

Ordering

[93] The record was not clear as to whether DCAS was merely the interface for pre-ordering or serves all parts of Bell Atlantic's OSS. *See*, Boccio/Canny pf. at 6 ("DCAS is the interface to all Bell Atlantic OSS's.")

70. After a CLEC uses the pre-ordering function, in some cases it will place an order. These orders may apply to a UNE or resale. An order may be placed using all three interfaces, EDI, EIF, Web GUI. Miller/DeVito pf. at 7.

71. After Bell Atlantic has processed an order, it transmits automated notification to CLECs of order confirmation, order completion, and order rejection or errors. Miller/DeVito pf. at 8.

72. In November, 1997, Bell Atlantic began to allow CLECs to make changes to orders previously submitted but not yet accepted. Miller/DeVito pf. at 8.

73. All CLEC orders for resale are submitted electronically. If errors are found, the order is returned electronically to the CLEC along with a description of the error for correction. Miller/DeVito pf. at 8-9.

74. Of 152 service orders placed for Vermont in May, 1998, 145 were placed through the OSS. The remaining seven were transmitted from CLECs by FAX. One year previously, most or all such orders had been placed by FAX. Miller/DeVito pf. at 9; tr. 6/17/98 at 185-86 (DeVito).

75. In July, 1998, Bell Atlantic planned some enhancements to its OSS related to ordering. These included:

(A) Permitting CLECs to omit typing some customer information, such as "directory listed address" when the CLEC uses the OSS to convert the customer from Bell Atlantic service.

(B) Allowing CLECs to find the trouble report history on the lines serving its customers.

(C) Reducing the response time on producing customer service records.

(D) Allowing a CLEC to enter any telephone number into the OSS and have the OSS enter the data for the billed telephone number.

(E) Creating a "loss of line report" which informs one CLEC that its customer has been moved to another CLEC.

(F) Allowing any CLEC representative to access information entered by other representatives of that same CLEC. Tr. 6/17/98 at 167-172 (DeVito).

76. An order "flows through" Bell Atlantic's OSS when it can be accepted and implemented without manual intervention by a Bell Atlantic employee. For orders of a type that are permitted to flow through, approximately 70% actually succeed in doing so. Tr. 6/17/97 at 161-62 (DeVito); Miller/DeVito pf. at 9.

77. Examples of orders capable of flowing through include new lines, including those with custom calling features, PIC changes, optional calling plans, customer or company initiated blocking, call forwarding, and "phonesmart" services. Also included are changes to class of service, changes of features, and disconnections. Exh. Bell Atlantic-C-1.

78. In December, 1997, Bell Atlantic increased the number of transaction types that could flow through. Tr. 6/17/98 at 174 (DeVito).

79. Under Bell Atlantic's rules, some orders are not eligible for flow through treatment. These include resale orders with certain unusual features such as call answering and hunting, resale orders of more than 20 lines and UNE new loop orders of 10 lines or more. Miller/DeVito pf. at 9; tr. 6/17/98 at 178 (DeVito); *see also*, tr. 6/18/98 at 9 (Canny).

80. In Vermont, during December, 1997, 38% of resale orders flowed through. Exh. Bell Atlantic-C-3.

81. Orders requiring manual handling are referred to a "wholesale work center" where a representative reviews the order for errors and, if necessary, sends an electronic "query," usually in the form of an e-mail message to the CLEC for more information. In New England, Bell Atlantic operates two such centers: a Resale Service Center with 105 service representatives; and a UNE Order Center with 67 service representatives. Bell Atlantic also has an outsourcing company to handle overflow resale orders. Miller/DeVito pf. at 10.

82. All orders, whether of a "flow through" or manual processing character, are subject to the same standards for due dates. Tr. 6/17/98 at 185 (DeVito).

83. Bell Atlantic does error checking on CLEC data entered during ordering, including orders that are not eligible for flow through. Not all CLEC errors in entering ordering information into the OSS are detected immediately. For some kinds of errors, Bell Atlantic notifies the CLEC of the error, and of the rejection of the order, at a later time. Some of these notifications are performed electronically; other notifications are performed by telephone call. Tr. 6/17/98 at 106-07 (Raymond); tr. 6/17/98 at 141-42, 181 (DeVito).

84. Bell Atlantic provides order confirmation, rejection and completion notices to CLECS. These notices are not provided to Bell Atlantic's own customer service representatives. Boccio/Canny pf. at 7.

85. Bell Atlantic's own customer service representatives receive no better treatment than CLEC representatives. In one respect, CLECs receive better treatment. Tr. 6/17/97 at 145-147 (DeVito) (error checking the same for Bell Atlantic and CLECs in processing of product and service availability checks, except that CLEC receives superior presentation of data); Boccio/Canny pf. at 7 (CLECs receive more complete notification of the status of placed orders).

86. Some CLECs are performing follow-up queries on their orders. These queries are intended to ascertain if the CLEC's prior orders have been accepted. Some of Bell Atlantic's customer service representatives also perform follow-up queries on their orders. Tr. 6/17/98 at 107 (Raymond); tr. 6/17/97 at 153-54 (DeVito).

87. From October, 1996 through the end of 1997, Bell Atlantic North processed approximately 87,100 resale orders for over 162,000 lines, of which 42,000 were in the New England states. Approximately 93% of resale orders were for business lines and 7% were for residence lines. Approximately 35 CLECs were submitted resale orders to Bell Atlantic North in February, 1998. Miller/DeVito pf. at 11.

88. From January, 1997 to February, 1998, Bell Atlantic North processed approximately 1,700 UNE loop orders for more than 6,400 loops. In addition, Bell Atlantic North received 1,600 orders to port 5,500 telephone numbers on a stand-alone Bell Atlanticsis. As of February, 1998, approximately 10 CLECS had submitted orders for UNE loops and interim number portability in Bell Atlantic North. Miller/DeVito pf. at 11.

89. Coopers and Lybrand, an accounting firm, conducted a stress test of Bell Atlantic North's ordering system. The test demonstrated that Bell Atlantic North is capable of processing over 15,000 orders in three days with daily spikes of 7,500 orders. This is approximately five times the projected average daily volume for 1998. Bell Atlantic agreed to perform a subsequent independent test in the late summer of 1998. The test was to be performed under the supervision of the New York Public Service Commission by the accounting firm KPMG. Because of the timing of the test, the results are not in the record. Miller/DeVito pf. at 11; tr. 6/17/97 at 166 (DeVito); exh. Board-C-3.

90. CLEC orders that are entered into Bell Atlantic-North's system are provisioned in the same manner as Bell Atlantic's own retail orders. Acknowledgments and status reports are provided to CLECs by the same interfaces used for submitting orders. Miller/DeVito pf. at 12.

91. After September, 1997, Bell Atlantic improved its ordering of OSS in several ways. This included allowing CLECs to obtain status reports on submitted orders and to perform service order inquiries. This allows CLECs to determine where an order is within Bell Atlantic's provisioning process. Miller/DeVito pf. at 12.

Maintenance and Repair

92. Bell Atlantic's OSS includes maintenance and repair functions. This is accomplished through a web-based interface called Repair Trouble Administration System ("RETAS"). RETAS allows CLECs to test a line, create and modify trouble tickets, check the status of a trouble report, close a trouble report, and secure a history of troubles on a line. Miller/DeVito pf. at 13.

93. Once troubles are reported, Bell Atlantic uses the same underlying OSS whether the report concerns a CLEC customer or one of Bell Atlantic's own retail customers. Miller/DeVito pf. at 13.

94. Bell Atlantic's trouble reporting interface for wholesale customers handled approximately 18,000 trouble reports during 1997. Miller/DeVito pf. at 13.

95. Coopers and Lybrand tested the capacity of the trouble reporting system and found that maximum utilization during testing reached only 66% of capacity. Miller/DeVito pf. at 13.

96. Bell Atlantic also accepts manual reporting from CLECs of trouble reports. Miller/DeVito pf. at 13.

Billing

97. Bell Atlantic's OSS includes two billing functions. The first is to provide usage and non-usage data to CLECs so that they may create bills for their retail customers ("daily feed"). The second is to develop the wholesale bill that Bell Atlantic presents to the CLEC for payment. Miller/DeVito pf. at 14.

98. Customer usage data is collected by Bell Atlantic daily. In the fourth quarter of 1997, Bell Atlantic provided 96% of usage data to CLECs within four business days. Miller/DeVito pf. at 15.

99. Wholesale bills are sent to CLECs either electronically, on tape, or on CD-ROM, at the CLEC's option. Miller/DeVito pf. at 16.

100. Coopers and Lybrand conducted a limited test of Bell Atlantic's ability to accurately record and bill call usage data. The test consisted of making 182 calls of different types and then verifying whether the recording and billing system were accurate. All test calls appeared accurately recorded. Miller/DeVito pf. at 17.

101. On peak days, Bell Atlantic's billing system used 72% of its total capacity. Miller/DeVito pf. at 16.1

Training

102. Bell Atlantic offers training to CLEC employees. It has trained approximately 1,000 CLEC employees from 87 companies on UNE and resale processing. Miller/DeVito pf. at 18.

Discussion

The DPS charges that Bell Atlantic provides "non-mediated interfaces"[94] to its OSS, and that these interfaces do not provide CLECs equivalent abilities to manage their orders for service. In particular, the DPS is concerned that certain fields on data entry screens are not checked sufficiently.[95] The DPS also objects that the OSS does not "kick back" error messages at the point of data entry, and requires an interval of time to pass before the error is reported.[96] In support of its position, the DPS offered an exhibit consisting of a ruling from a New York Administrative Law Judge in which New York Telephone's support access to operations support systems was found to be inferior to that provided to New York Telephone itself.

We do not find the New York order probative here. While the New York and Vermont OSS systems are fundamentally the same, there are some differences in the underlying services provided and in the locations from which support is offered. Also, there have been changes to the OSS system since the New York record was closed.[97] In addition, the New York document was not a commission order, but a preliminary ruling from an administrative law judge, and the New

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[94] Raymond pf. at 9. The DPS defines a "mediated interface" as including, for example, a requirement that the user present a password. Tr. 6/17/98 at 104 (Raymond).

[95] Tr. 6/17/98 at 105 (Raymond).

[96] Raymond pf. at 9; *see* exh. DPS-C-1 at 25-27.

[97] The New York ruling was based upon a filing made as to New York in February, 1997. DeVito reb. pf. at 3. This docket is concerned with compliance in Vermont on September 30, 1997.

York order includes at least one finding that does not apply to Vermont on September 30, 1997.[98] The New York findings raise interesting issues, but the record does not show that the problems identified in New York apply to Bell Atlantic in Vermont at this time.

The DPS's criticism of "non mediated" interfaces was gauged broadly, and did not describe any particular circumstances where, in its view, more security is required or a more accurate or more timely response to incorrect data entry is warranted. The record is not sufficient to support the DPS's criticism. Rather, the record shows that Bell Atlantic's interface is "mediated," in the sense that passwords protect the confidentiality of CLEC information from other CLECs and from most Bell Atlantic employees. The DPS has not shown how Bell Atlantic's password protection system creates an impediment for CLECs.

In the absence of specific allegations, therefore, we interpret the DPS criticism of a "non mediated" interface as amounting to a complaint that Bell Atlantic does not conduct sufficient editing checks of data entered by CLECs. In particular, we interpret the DPS objection as directed against the fact that certain kinds of CLEC errors, made while entering ordering data into the OSS, are not immediately detected by Bell Atlantic and that therefore the CLEC receives a delayed report of the error, possibly accompanied by rejection of the order.[99]

Bell Atlantic does perform some preliminary scrutiny of data entered by a CLEC, and it does provide prompt responses if that information is incorrect. The record is clear that at least some kinds of errors, such as a failure to fill in required information fields, produce immediate responses. Other kinds of errors do not produce an immediate response, but a delayed error message some time after the error is detected. The record is not clear as to which kinds of errors produce this delayed response, whether the delay is unreasonable, nor whether Bell Atlantic's retail operations receive the same treatment of errors.

The DPS has suggested that most or all possible errors made by a CLEC during order entry can or should produce an immediate OSS error message back to the entering CLEC.[100] It seems plausible that if some error messages must be generated by "back end" systems, and since

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[98] For example, the New York order found that loop orders can only be ordered by fax to Bell Atlantic. This was not true in Vermont on 9/30/97. DeVito reb. pf. at 3; tr. 6/17/98 at 171 (DeVito). *See also,* tr. 6/17/97 at 159 (DeVito) (N.Y. judge erroneously found that Bell Atlantic did not support primary interexchange carrier selection).

[99] Tr. 6/17/98 at 107 (Raymond).

[100] The record does not support a detailed analysis of particular kinds of errors and responses.

these systems are not in constant communication with the user's interface, immediate error messages are not possible. We are not aware of any legal authority upon which we could conclude that the Competitive Checklist requires that all errors be identified and reported immediately.

The actual legal standard is that Bell Atlantic must treat its own customer service representatives and the CLEC's representatives in a nondiscriminatory manner. The DPS claims that Bell Atlantic treats its own customer support representatives better than it treats CLEC representatives,[101] but the DPS failed to show any detailed circumstances in which such discrimination occurs. On the contrary, Bell Atlantic has shown in numerous ways that its own representatives receive the same treatment as CLEC representatives, and at least one way in which CLECs receive better treatment. We do not find any improper discrimination against the CLECs.

As noted above, current interpretations of the Competitive Checklist require that Bell Atlantic be prepared as a practical matter to meet CLEC needs for UNEs. One way to ensure such a capability exists is to measure to OSS performance with a realistic but large quantity of transactions. Of course, as we found above, no Vermont CLECs were using the OSS on September 30, 1997. It also is not apparent that stresses from CLECs in other states in Bell Atlantic-North were sufficient to test Bell Atlantic's OSS. At this time, there has not been sufficient testing of the OSS to demonstrate its adequacy.[102] The record in this case does not, therefore, demonstrate that Bell Atlantic's OSS is presently capable of meeting reasonable CLEC demands; conversely, it does not demonstrate the OSS's system's inadequacy.

Were this proceeding an evaluation under Section 271, we would be unable to conclude that Bell Atlantic met the Competitive Checklist. However, as we have explained previously, the Board's purpose in this proceeding was to use the Competitive Checklist as a benchmark for ensuring that Bell Atlantic was making sufficient progress towards opening its markets to competition. For these purposes, we find Bell Atlantic's deployment of the OSS adequate. The record makes clear the need for further testing, such as that presently being performed in New York. Following completion of the New York OSS study, the Board and parties should examine

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[101] Tr. 6/17/98 at 109 (Raymond).

[102] As a result of Bell Atlantic's Prefiling Statement in New York, the Company has agreed to the performance of an independent assessment of the OSS in that state. Exh. Board-C-3. That test is still underway.

the results and assess whether those results are adequate in Vermont. We recommend that the Board cooperate with other New England states to conduct this assessment and to prepare a separate set of tests if the New York test is not adequate.

The DPS notes that the SGAT does not assure CLECs that market intelligence will not be passed to Bell Atlantic in the course of ordering services or elements.[103] Based upon the discussion above relating to interconnection and UNEs, we conclude that Bell Atlantic has taken sufficient steps to protect CLEC information and that the compromising of such information is speculative.

Based upon the evidence of record, we conclude that Bell Atlantic has made sufficient progress in developing and deploying its OSS to meet the goals of the merger compliance condition.

Criterion Two, Part C - Performance Measurements

Legal Standard

There is no requirement under the Competitive Checklist for a performance measuring system, although any such system is certainly useful in demonstrating compliance with the nondiscrimination requirements in the checklist. Bell Atlantic has undertaken to establish such a system as a result of the merger between Bell Atlantic and NYNEX. Performance measurements, in identical or similar form, are available for all Bell Atlantic states.

Findings

103. Bell Atlantic has created and implemented a comprehensive system of service performance measurements for timeliness, reliability and quality. The data apply to Vermont specifically. An enhancement to this system was implemented in September, 1997. Boccio/Canny pf. at 2-3.

104. Many measurements are reported in a way that allows comparison between Bell Atlantic's wholesale and retail work. Measurements for some UNEs are made by more general comparisons. Boccio/Canny pf. at 2, 4, 8-9.

[103] Raymond pf. At 10.

105. Bell Atlantic measures performance in six broad areas. They are: pre-ordering; ordering; provisioning; maintenance and repair; network performance; and billing. Boccio/Canny pf. at 3.

106. Pre-ordering measurements include: the response times of Bell Atlantic's OSS to queries; and the availability of OSS access. Response times are measured for various types of transactions. Results for CLECs are compared to results of comparable measurements for Bell Atlantic itself within Vermont or to absolute standards. Boccio/Canny pf. at 4.

107. In December, 1997, Bell Atlantic failed to provide parity in response times to pre-ordering inquiries. For example, it responded on average to an address validation inquiry in one second for its own retail representatives, but it took almost eight seconds to respond to a CLEC inquiry. Exh. Bell Atlantic-C-3.

108. Bell Atlantic's stated goal for pre-order inquiries is to respond to a CLEC inquiry within four seconds. However, in September, 1997, Bell Atlantic's response time failed to meet this goal for:

(A) due date availability inquiries;

(B) address validation inquiries; and

(C) product and service availability inquiries.

Bell Atlantic is redesigning software to improve this record. Exh. Bell Atlantic-C-3; tr. 6/18/98 at 27-28 (Canny).

109. Ordering measurements include:

(A) timeliness of order confirmation, rejection or completion, rejection notices and completion notices, on a CLEC specific basis, and reported separately for interconnection trunks, UNEs and resold services, and separately for large and small resale orders; and

(B) percentage of orders that "flow through" without manual intervention.

Boccio/Canny pf. at 4, 6-7.

110. Bell Atlantic has installed a computer system, named "Sentinel," that simulates the effect of a CLEC employee entering information into the OSS. Response times are then noted and recorded. Boccio/Canny pf. at 5.

111. Bell Atlantic has established a standard that it will respond to 90% of new flow through orders within two hours. Accepted orders are reported back with a committed due date and an order number. Complex orders that require manual processing are returned within 24 hours. Boccio/Canny pf. at 7; tr. 6/18/98 at 41-42 (Canny).

112. Because of lack of CLEC activity in Vermont, Bell Atlantic did not submit data concerning resale or UNE ordering performance during the September to December, 1997, time frame. Exh. Bell Atlantic-C-3.

113. Provisioning measurements are made on a CLEC-specific basis and are reported separately for interconnection trunks, UNEs and resold services. The measurements include:

(A) offered and completed provisioning intervals;

(B) percentage of orders completed within five business days;

(C) missed appointments; and

(D) troubles reported within 30 days of installation.

Boccio/Canny pf. at 4, 8-9.

114. Because of lack of CLEC activity in Vermont, Bell Atlantic did not submit data concerning resale or UNE provisioning performance during the September to December, 1997, time frame. Comparative retail data were submitted. Exh. Bell Atlantic-C-3.

115. Repair and maintenance measurements are made on a CLEC specific basis and are reported separately for interconnection trunks, UNEs and resold services. The measurements include:

(A) trouble report rate;

(B) time to restore service;

(C) missed repair appointments;

(D) lines out of service for more than 24 hours; and

(E) percentage of repeat trouble reports within 30 days of repair.

Measurements are compared between wholesale and retail work. Boccio/Canny pf. at 4, 10-11.

116. Because of lack of CLEC activity in Vermont, Bell Atlantic did not submit data concerning resale or UNE maintenance performance during the September to December, 1997, time frame. Comparative retail data were submitted. Exh. Bell Atlantic-C-3.

117. Network performance measurements measure blockage on "final" trunks that carry CLEC traffic. Final trunks are the last trunk to receive traffic in any trunk group. Data are

measured for common trunks (which carry Bell Atlantic and CLEC traffic) and CLEC dedicated trunks. Boccio/Canny pf. at 11-12.

118. In September to December, 1997, no Bell Atlantic or CLEC final trunks were blocked. Exh. Bell Atlantic-C-3.

119. Billing measurements include measures of timeliness in providing usage information ("daily usage feeds") and carrier bills to CLECs. Boccio/Canny pf. at 4, 13.

120. Some carriers receive multiple bills in a month. For such carriers, Bell Atlantic's standard is to deliver 98 percent of carrier bills within 10 days of the bill date. Boccio/Canny pf. at 14.

121. Bell Atlantic makes measurement reports available to carriers upon request. Reports can include Bell Atlantic data, aggregate CLEC data, and individual CLEC data.

122. Bell Atlantic did submit data concerning billing performance during the September to December, 1997, time frame. In each month, at least 96% of daily usage feeds were delivered within 5 business days, and 100% of carrier bills were timely. Exh. Bell Atlantic-C-3.

123. Bell Atlantic's metrics filings for Vermont are not confidential, and monthly data are available on the Internet at the FCC's web site. Tr. 6/18/98 at 30 (Canny).

Discussion

Bell Atlantic has established a system to measure parity. It is a comprehensive system of service performance measurements that records timeliness, reliability and quality. Bell Atlantic has provided supporting data for time periods beginning September 1997 through December 1997.

The parties did not provide a detailed analysis of the measurement results in their evidence or briefs. In some significant areas, Bell Atlantic's metrics for Vermont show that it has unresolved problems providing equal quality service to CLECs. In particular, its response time to preordering inquiries by CLECS was considerably slower than comparable inquiries from its own representatives. While a seven-second additional delay for a CLEC inquiry will not cause a CLEC to fail, the difference is significant, nevertheless, and it should be eliminated. We recommend that Bell Atlantic be required to show that it has met its four-second response time goal as to all forms of preordering inquiries.

The evidence also demonstrates that the OSS is still under active development, and Bell Atlantic, at least in its northern region, is making substantial improvement in its performance measurements. We conclude that Bell Atlantic's performance measurement system is reasonable. We recommend that Bell Atlantic be required to show in a compliance filing that it has met its stated goal of a four-second response time as to all CLEC preordering inquiries.

Criterion Three - Poles, Ducts, Conduits and Rights-of-Way

Legal Standard

Telephone wires often are attached to poles, pass through ducts and conduits, and cross over rights-of-way. A competitive carrier desiring to provide local exchange service may need to place its own wires in those facilities. Bell Atlantic must provide or generally offer access to the poles, ducts, conduits, and rights-of-way owned or controlled by Bell Atlantic. In addition, this access must be provided at just and reasonable rates and in accordance with the requirements of section 224 of the Act.[104] If Bell Atlantic should fail to provide such access, CLECs may be prevented from serving their customers.

Bell Atlantic must provide nondiscriminatory access. Evidence that Bell Atlantic provides competitors access to poles, ducts, conduits and rights-of-way on the same basis that it provides access to its own workers would tend to establish that such access is nondiscriminatory. Bell Atlantic can also show that competing providers can obtain access within reasonable time frames and on reasonable terms and conditions.

The Act grants the FCC general authority over access to poles, ducts, conduits and rights-of-way.[105] However, states may elect to displace this jurisdiction, and thereafter Bell Atlantic must comply with the state's, rather than the FCC's, regulations.[106] Vermont has displaced FCC jurisdiction.[107]

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[104] 47 U.S.C. §§ 271(c)(2)(B)(iii), 224.

[105] 47 U.S.C. § 227(b).

[106] 47 U.S.C. §227(c)(1). The FCC has termed this displacement "reverse preemption." *Local Competition First Report and Order* at ¶ 1239.

[107] Chu reb. pf. at 7.

Bell Atlantic must provide access to poles, ducts, conduits and rights-of-way at just and reasonable terms, and conditions.[108] The Act establishes a preference for negotiations among the parties to establish the terms of pole attachments.[109]

Nonetheless, where the parties do not arrive at mutually satisfactory pole attachment arrangements, and if the state has not exercised its preemptive authority under section 224(c), Bell Atlantic must comply with the statutory requirements of section 224 and the Commission's implementing regulations.[110] If a State has assumed authority, as Vermont has, Bell Atlantic must comply with any requirements set by the Board.

Where a utility imposes conditions on access, the reasonableness of those conditions should be resolved on a case-specific basis.[111] Nevertheless, the FCC has identified five particular circumstances where conditions on access to poles, ducts, and conduits, and rights-of-way may be reasonable.

> (1) In evaluating a request for access, a utility should continue to rely on widely-accepted codes, such as the National Electric Safety Code (NESC), to prescribe standards with respect to capacity, safety, reliability, and general engineering principles.[112]
>
> (2) Federal requirements, such as those imposed by the Federal Energy Regulatory Commission (FERC) and the Occupational Safety and Health Administration (OSHA), should continue to apply to utilities to the extent such requirements affect requests for access pursuant to section 224(f).[113]
>
> (3) State and local requirements affecting pole attachments are presumed to be reasonable, even if the state has not sought to preempt federal regulations under section 224(c).[114]

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[108] 47 U.S.C. §§ 271(c)(2)(B)(iii), 224(b)(1).

[109] *See Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order ("*Pole Attachment Telecommunications Rate Order*") at ¶¶ 10-21, FCC 98-20 (rel. Feb. 6, 1998).

[110] *Local Competition First Report and Order* at ¶ 1239.

[111] *Local Competition First Report and Order at* ¶ 1143.

[112] *Local Competition First Report and Order* at ¶ 1151.

[113] *Local Competition First Report and Order* at ¶ 1152.

[114] *Local Competition First Report and Order* at ¶ 1153.

(4) Where access is mandated, the rates, terms, and conditions of access should be uniformly applied to all telecommunications carriers and cable operators that have or seek access pursuant to section 224(f).[115]

(5) A utility should not favor itself over other parties with respect to the provision of telecommunications or video programming services.[116]

Bell Atlantic also must provide access to poles, ducts, conduits and rights-of-way at just and reasonable rates.[117] The Act states that a rate is just and reasonable if it assures a utility that it's cost recovery is:

- not less than the additional costs of providing pole attachments; and

- not more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment, by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.[118]

Findings

Pole Attachments

124. Bell Atlantic attached a pole attachment agreement to the SGAT. The SGAT also provides rates for attachments. For example, the SGAT prescribes a rate of $12.07 per year as an annual pole attachment fee for a pole owned solely by Bell Atlantic. This is the same contract that Bell Atlantic has used in the past with cable television and communications companies. Chu pf. at 20; exh. Board-C-1, § 4.7.3.6 (A).

125. The contract attached to the SGAT has been supplanted by Tariff No. 26, which was approved on October 26, 1997. Tariff No. 26 allows telecommunications carriers, as well as cable television providers, to gain attachment to Bell Atlantic's poles. Chu pf. at 20; Raymond pf. at 5; Chu reb. pf. at 5-6; tr. 6/18/98 at 111 (Tariff No. 26 incorporated into the record); tr. 6/18/98 at 54 (Chu).

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[115] *Local Competition First Report and Order* at ¶ 1156.

[116] *Local Competition First Report and Order* at ¶ 1151.

[117] 47 U.S.C. §§ 271(c)(2)(B)(iii), 224(b)(1).

[118] 47 U.S.C. § 224(d)(1). After February 8, 2001, the rate for pole attachments used to provide telecommunications service will be "just and reasonable" if the rate for such attachments complies with the Commission's regulations implementing the requirements of section 224(e). 47 U.S.C. §§ 224(e); *Pole Attachment Telecommunications Rate Order* ¶¶ 20-21, 125.

126. Bell Atlantic charges a CLEC for anchor and pole replacements when the existing poles are insufficient to support the CLEC's proposed attachments. Sometimes Bell Atlantic does more work on a pole than the CLEC's attachment requires, and in that event the CLEC's bill is adjusted proportionally. Chu reb. pf. at 8; tr. 6/18/98 at 78-79 (Chu).

127. Adelphia is a cable provider in Vermont and Hyperion is a CLEC in Vermont. Bell Atlantic has permitted Hyperion to overlash on Adelphia's facilities. Chu reb. pf. at 6; tr. 6/17/98 at 31 (Raymond).

128. After a CLEC requests pole attachments ("make ready") or new poles, Bell Atlantic conducts a survey. Within 30 days of completing the survey, Bell Atlantic gives a commitment date to complete the actual work for pole attachments. The SGAT does not require that the commitment date be within a particular time. Raymond pf. at 6; tr. 6/17/98 at 33 (Raymond).

129. A CLEC can submit no more than 200 pole attachment requests at any one time. A CLEC can have no more than 2000 pole attachment requests active at any one time in any of six areas of the state. Therefore, a CLEC could have as many as 12,000 pole attachment requests pending at one time. A similar pole request limitation exists in New York. No carrier has approached the maximum number of pole attachment requests in Vermont or in New York. When a CLEC has multiple requests for pole attachments pending, it must establish a priority order among them. Raymond pf. at 6-7; Chu reb. pf. at 7; tr. 6/18/98 at 113 (Chu).

Ducts and Conduits

130. Bell Atlantic provides access to ducts and conduits pursuant to a "Conduit Occupancy Agreement" attached to the SGAT. The SGAT also provides the rates for conduit occupancy. This is the same contract that Bell Atlantic has used in the past with cable television and communications companies. However, Bell Atlantic asserted that it was reviewing the contracts and that it will not assert any rights under the contract that are in conflict with the Act. Chu pf. at 20; Raymond pf. at 5; Chu reb. pf. at 6; tr. 6/18/98 at 55 (Chu).

131. The SGAT authorizes Bell Atlantic to survey available space and to charge applicants for that survey work. Raymond pf. at 7.

132. Bell Atlantic's conduit license agreement permits Bell Atlantic to inspect a CLEC's facilities at any time. Raymond pf. at 7.

133. Very little conduit is used by telecommunications carriers in Vermont. Chu reb. pf. at 6; tr. 6/17/98 at 56 (Raymond).

134. No CLEC complaints had been made regarding conduit access by September 30, 1997. Tr. 6/17/98 at 55 (Raymond).

Rights of Way

135. Bell Atlantic provides access to private rights-of-way, either owned or controlled by Bell Atlantic, pursuant to a "Master Right-of-Way Licensing and Apportionment Agreement" attached to the SGAT. Rates for access to private rights-of-way are developed on an individual case basis. This is the same contract that Bell Atlantic has used in the past with cable television and communications companies. Chu pf. at 20-21; Raymond pf. at 5.

136. Requests for access to poles, ducts, conduits and rights-of-way are made through a Bell Atlantic Licensing Coordinator. The applicant must submit an Order. The Licensing Coordinator then provides a written estimate of costs, in some cases after a field survey. Thereafter an engineering work order is prepared. After the requesting carrier pays for the work, Bell Atlantic then performs the work. Chu pf. at 21.

137. Bell Atlantic provides "straight line drawings" of the location of existing facilities to carriers to assist in preparing requests for poles, ducts, conduits and rights-of-way. Chu pf. at 21-22.

138. Bell Atlantic provides access to its spare capacity. It defines "spare capacity" as the amount available after maintenance and growth requirements needed to meet Bell Atlantic's carrier of last resort obligations. Bell Atlantic may deny access for reasons of safety, reliability, and engineering. Chu pf. at 22.

139. No CLEC has complained about Bell Atlantic's pole attachment tariff or its pole or conduit licensing agreements. Chu reb. pf. at 6.

Pricing

140. Under the SGAT, all field work provided by Bell Atlantic related to pole attachments and conduits is subject to a ten percent mark-up. This mark-up is authorized under currently filed tariffs. Bell Atlantic does not impose a similar charge for its own pole make-ready work. Chu reb. pf. at 7; tr. 6/18/98 at 55 (Chu); Raymond pf. at 7.

141. When a pole upgrade is needed because of a new attachment, the cost causer is required to pay for the upgrade. This applies to CLECs, to Bell Atlantic itself, and to other utilities such as power companies. Tr. 6/18/98 at 79, 131 (Chu).

142. Bell Atlantic subtracts the costs associated with any plant betterment from the charges imposed on the CLEC. Chu reb. pf. at 8.

143. Bell Atlantic follows the requirements of federal statutory law in safeguarding confidential information submitted by competitors with regard to use of proprietary information obtained from requests for pole attachments, conduits and rights-of-way. Those requirements prohibit Bell Atlantic from using proprietary information obtained from another carrier for any other purpose. In addition, the statute also prohibits Bell Atlantic from reusing such information for Bell Atlantic's own marketing efforts. 47 U.S.C. § 222(b); Chu reb. pf. at 8.

Discussion

Bell Atlantic has established a prima facie case that its pole attachment, conduit, and rights-of-way tariffs and agreements meet the requirements of checklist item III, as described above. The DPS, however, has challenged several particular aspects of Bell Atlantic's compliance with Criterion Three.

Tariffs

The DPS contends that the pole attachment agreement was designed for cable television and thus was based on an assumption that the licensees would not be competing with Bell Atlantic for customers. The DPS asserts that the current agreement is unsuitable in several ways for use by CLECs competing against Bell Atlantic for local telephone service subscribers. In particular, the DPS challenges Bell Atlantic's ability to charge for an unlimited amount of make- ready work without established time or resource guidelines and including the ability of Bell Atlantic to set any commitment date it deems appropriate. It recommends that the Board hold Bell Atlantic to the same intervals for completion of the work as Bell Atlantic affords itself.

We agree that the concern raised by the Department would prevent the pole attachment agreement from being completely neutral. However Bell Atlantic now has a new tariff in effect for pole attachments, and the original agreement is no longer in effect. Bell Atlantic should revise its SGAT to remove reference to the obsolete agreement. There is no evidence that this new tariff suffers from the infirmities that the DPS criticizes in the old agreement. Moreover, no CLEC has complained about Bell Atlantic's pole attachment tariff or its pole or conduit licensing agreements. The DPS has not shown that the terms of Bell Atlantic's tariffs with regard to pole attachments, conduits and rights-of-way are unsuitable for application to competitors.

Timeliness of Pole Attachment Work

The DPS charges that the SGAT is not sufficiently precise as to when pole attachment work will be performed.[119] In the DPS's view, this could reduce CLEC competitiveness since CLECs would be unable to forecast for their customers when the work will be complete. Even when the work is complete, the DPS charges that the completion date could be delayed in comparison to Bell Atlantic's own work.

The DPS suggests that the Board require Bell Atlantic to include in the SGAT a specific schedule for performing pole attachment work and new pole placement work.[120] This would allow CLECs to assure their customers that new services will be available on a known date. The DPS suggests that the standards could be stated in probabilistic terms, such as a 95 percent confidence interval, and should, at least for new poles, be similar to a standard applicable to retail customers.[121] The DPS acknowledges, however, that pole attachments are of varying complexity, and that different standards might be needed for different situations.[122]

We do not recommend that Bell Atlantic be required to adopt a fixed standard for performing pole attachment or pole installation work. Since there had not been any pole attachment requests by September 30, 1997, the record does not disclose any reason to believe that CLECs have had an actual problem or even that the situation is likely to have any deleterious effects upon CLECs.

More important, there are many variables inherent in outside plant work, including the amount of pending work, weather conditions, the availability of outside contractors, the amount of make-ready work involved, Bell Atlantic's labor relations agreements,[123] and the timeliness of work by other pole users in performing their own make-ready work. Because of all these variables, we do not believe that a fixed standard for pole attachment work is warranted. Moreover, we are not clear about how we would enforce a standard that applies, by its terms, only in 90 percent of the cases.

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[119] Tr. 6/17/98 at 33 (Raymond).

[120] Tr. 6/17/98 at 34-35, 37, 47 (Raymond).

[121] Tr. 6/17/98 at 38, 50 (Raymond). Bell Atlantic and the DPS have been discussing a standard for retail customers seeking placement of new poles. The proposed standard is that Bell Atlantic would make a commitment date within 30 days and would be obligated to install within 180 days of the date the retail customer makes the deposit. The discussions have been in the context of designing the current price cap proposal now under consideration in another docket. Tr. 6/17/98 at 38-39 (Raymond).

[122] Tr. 6/17/98 at 49-50 (Raymond).

[123] The DPS witness had not reviewed Bell Atlantic's labor relations contracts. Tr. 6/17/98 at 36 (Raymond).

The DPS also recommends that Bell Atlantic be required to meet the same intervals for performing CLEC and its own retail customers.[124] This equality would apply to turnaround on make-ready work and for the scheduling of pole attachment work. This recommendation is essentially a restatement of the federal standard of nondiscrimination. We noted above that the checklist requires Bell Atlantic to provide nondiscriminatory access to poles, conduits and rights-of-way. There is no evidence that there exists any disparity between work scheduled for Bell Atlantic itself and work scheduled for CLECs.[125] We agree that the federal standard of nondiscrimination applies to Bell Atlantic, but we do not believe any further action is required here. If the DPS or any CLEC should conclude that Bell Atlantic's pole attachment work schedules are discriminatory, they are free at any time to bring a complaint to the Board.

Confidentiality

The DPS contends that the SGAT requires CLECs to share competitively sensitive information, or otherwise harm a CLEC's entry into the local market. In particular, the DPS challenges Bell Atlantic's reservation of authority under the SGAT to require CLECs to identify priorities for pole attachment work.

When a CLEC has multiple requests for pole attachments pending, it must establish a priority order among them. The DPS maintains that this information should be privileged, since it can indicate marketing entry priorities, but the SGAT does not explicitly state that such information will be confidential or privileged. Similarly, the DPS maintains that pole attachment provisions do not restrict Bell Atlantic from passing information provided from the make ready work orders to Bell Atlantic's own marketing groups.

Bell Atlantic has successfully rebutted this challenge. Section 222 of the Act prohibits Bell Atlantic from taking advantage of this information by passing it to its marketing forces or otherwise utilizing this competitively sensitive information to its own advantage. To implement this separation of functions, Bell Atlantic has formed a separate division to perform such work. Nothing in the record suggests that Bell Atlantic has violated or is likely to violate this federal statute. Thus, for purposes of assessing merger compliance, we find Bell Atlantic's actions sufficient to safeguard the information. Moreover, although we do not have any CLEC evidence

[124] Raymond pf. at 6; tr. 6/17/98 at 35 (Raymond).

[125] Tr. 6/17/98 at 31 (Raymond).

in this docket, it seems plausible that CLECs will actually prefer to be able to set priorities for work, as opposed to having all requested work done on a first-scheduled basis.[126]

Volume Limitations

The DPS also expressed a related concern that Bell Atlantic places limitations on the volumes of CLEC work orders. A CLEC may submit no more than 200 pole attachment requests at any one time, and no CLEC may exceed 2,000 pending requests in any of six areas of the state. The result is that a CLEC could theoretically have as many as 12,000 attachment requests at one time.

Limitations on pole attachment requests are not unreasonable on their face. Absent a limit, a CLEC could submit requests for a large number of pole attachments at once. This could conceivably disrupt Bell Atlantic's own construction schedules. Bell Atlantic would presumably not allow such latitude to its own outside plant engineers. While Bell Atlantic is obligated to treat CLECs in a way that is comparable to the way it treats its own staff, it is not required to do more.

The DPS has not shown that the present numerical limits create an unreasonable restriction. To the contrary, the evidence suggests that the limitations have had no effect to date.[127] Even in New York, where facilities-based competitors appear to be considerably more active than they have been so far in Vermont, a similar provision has not had any limiting effect. Therefore we conclude that Bell Atlantic has shown that at the present time the request limit is neither unreasonable nor discriminatory. We recognize, however, that as competition develops, it may be appropriate to revisit the limit and the manner in which Bell Atlantic balances its pole attachment work with other outside plant efforts.

Pricing

The DPS contends that the fees under the tariff are inconsistent with the pricing approaches detailed in the 1996 Act. In particular, the DPS finds two pricing provisions of the SGAT objectionable.

First, the DPS objects that the SGAT authorizes a ten percent mark-up on nonrecurring charges. This ten percent markup is consistent with Bell Atlantic's filed tariff. Bell Atlantic, however, has not explained why pole attachment work for CLECs should be more costly than

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[126] *See,* tr. 6/17/98 at 32-33 (Raymond).

[127] Tr. 6/17/98 at 32 (Raymond).

pole attachment work that Bell Atlantic does for itself. The Board has authority under 47 U.S.C. § 224(c)(1) to set rates and charges for this type of work.

Based upon the evidence of record, we conclude that a ten percent markup is discriminatory on its face. The Board should order Bell Atlantic to delete this provision from its tariff.

The DPS also objects to another provision that gives Bell Atlantic discretion to change CLECs for the costs of pole or anchor rod replacement. The DPS asserts this turns pole attachment field work into a profit center when the work is done for CLECs but a cost center when performed for Bell Atlantic, and gives Bell Atlantic an "opportunity for creative plant modernization" that is not consistent with the "just and reasonable" standard.

Bell Atlantic responds to this criticism by asserting that it applies the same rules to itself and to CLECs. The costs of anchor and pole replacements are borne by any carrier, Bell Atlantic maintains, only if the existing facilities are insufficient to support the proposed attachments.[128] This assertion by Bell Atlantic is unrebutted.

The record does not show that Bell Atlantic's policy or practice in this area is contrary to board policy, to FCC rules, or to federal statutes. Therefore we cannot conclude, based upon the record before us, that Bell Atlantic's theoretical ability to shift costs to CLECs for poles, conduits and rights-of-way creates an unreasonable or discriminatory pricing structure.[129]

We conclude that subject to the following condition, Bell Atlantic has met its burden of demonstrating compliance, as of September 30, 1997, with Competitive Checklist item III. The Board should order Bell Atlantic to delete from its pole attachment tariff the right to charge a 10 percent markup on pole attachment work, and Bell Atlantic should revise its SGAT to reference the appropriate tariff for pole attachment work.

Criterion Four - Local Loop Transmission

Legal Standard

[128] Bell Atlantic also contends that it reduces the charges imposed on the CLEC when the attachments produce any plant betterment, although the details were not explored in hearings.

[129] While the record here fails to demonstrate a problem with Bell Atlantic's existing pole attachment policies and practices, it is possible nevertheless that such a problem exists. It may be appropriate for the Board to conduct a more comprehensive evaluation of pole attachment policies and pricing.

Local loops are the wires, poles, and conduit that connect the telephone company end office to the customer's home or business. Bell Atlantic must provide or generally offer local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.[130] This provides CLECs with the opportunity to offer quality telephone service promptly without constructing new loops to each customer's home or business.

In addition, since local loop transmission is a "network element" under the Act, Bell Atlantic must provide this service on an unbundled basis and in a manner that is consistent with the Act's standards for interconnection agreements.[131] Those standards require Bell Atlantic to provide nondiscriminatory access to this network element on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.[132]

Interconnection to local loops must be offered at any technically feasible point.[133] Moreover, Bell Atlantic must provide access to any functionality of the loop requested by a CLEC unless it is not technically feasible to condition the loop facility to support the particular functionality requested.[134] For example, if it is technically feasible to unbundle a loop to allow the CLEC to provide greater bandwidth than that previously provided by Bell Atlantic over that loop, Bell Atlantic must provide this functionality, if technically feasible.

Rates, terms, and conditions must be just, reasonable, and nondiscriminatory.[135] To satisfy the nondiscrimination requirement, Bell Atlantic must demonstrate that it can efficiently furnish unbundled loops to CLECs within a reasonable time, with a minimum level of service disruption, and at the same level of service quality that it provides to itself. Loops must be made available to the CLEC with a minimum of service disruption.[136]

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[130] 47 U.S.C. § 271(c)(2)(B)(iv).

[131] 47 U.S.C. § 271(c)(2)(B)(ii), 251(c)(3), 252(d)(1). The Supreme Court has remanded to the FCC for further consideration its rule concerning network elements. *AT&T v. Iowa.*

[132] 47 U.S.C. § 251(c)(3).

[133] 47 U.S.C. §§ 271(c)(2)(B)(ii), 251(c)(3). The FCC has suggested that Bell Atlantic would need to provide nondiscriminatory access to the various types of unbundled loops identified by the Commission in the *Local Competition First Report and Order*, *e.g.*, 2-wire voice-grade analog loops, 4-wire voice-grade analog loops, and 2-wire and 4-wire loops conditioned to allow the CLEC to attach requisite equipment to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, and DS1-level signals. *Local Competition First Report and Order* at ¶ 380.

[134] *Local Competition First Report and Order* at ¶ 382.

[135] 47 U.S.C. §§ 271(c)(2)(B)(ii), 251(c)(3).

[136] 47 C.F.R. § 51.313(b); 47 C.F.R. § 51.311(b); *Local Competition First Report and Order* at ¶¶ 312-316.

In evaluating compliance with this requirement, the Board may consider comparative performance data. This may include information on how long it takes to install a loop, how often the promised installation dates are met, how well the CLEC is informed of the status of its order, and how responsive Bell Atlantic is in providing access to needed support functions.

Findings

144. Bell Atlantic provides local loops, unbundled from local switching and other elements. This offers a transmission facility between a distribution frame in a central office and the demarcation point on the customer's premises, usually called a "NID" or "network interface device." Chu pf. at 23.

145. Basic local loops are available consisting of analog 2-wire facilities, with an approximate bandwidth of 300-3000 Hertz. Premium local loops are also available consisting of digital 2-wire facilities suitable for use with digital services such as basic ISDN operating at 160 kilobits per second. High capacity local loops are also available to offer digital facilities at 1.544 Mbps or 44.736 Mbps. Chu pf. at 23.

146. Bell Atlantic does not have a tariff covering sub-loop unbundling. Any requests for sub-loop unbundling will be evaluated by Bell Atlantic on a case-by-case basis. Chu pf. at 24.

147. Bell Atlantic also makes available to the Network Interface Device which connects Bell Atlantic's outside plant facilities to an end user's inside wire. Chu pf. at 24-25.

148. Where a CLEC requests an existing loop, Bell Atlantic converts the loop to the new carrier using a process known as a "hot cut." Chu pf. at 26.

149. Loop assignments are handled on a first-come, first-served basis. Some orders are routed to Bell Atlantic's Network Provisioning Center. Chu pf. at 26.

150. Bell Atlantic also installs new loops on request. After assignment and design work is completed, a service order for a loop is distributed to Bell Atlantic's work groups for implementation. The other carrier is contacted to coordinate a "cutover" schedule. Chu pf. at 26.

151. Provisioning intervals differ based upon the type of loop requested and the number requested. For example:

(a) Hot cuts of basic loops are provisioned within five business days, and occur within a sixty-minute conversion window.

(b) A "DS1" loop is provisioned within seven working days, unless the "service order management administration report and tracking system" ('SMARTS') indicates that the next available due date is farther in the future.

(c) Requests for a NID to NID connection are generally provisioned within five business days.

(d) A 45 Mbps loop is provisioned on a negotiated basis, as are any requests for ten or more basic loops.

Chu pf. at 27-29.

152. The CLEC is responsible for notifying Bell Atlantic when there is a trouble condition on an unbundled local loop. Bell Atlantic uses the same process for clearing a trouble report for a CLEC and for its own customer's loops. Chu pf. at 28.

153. Local loops are available at Bell Atlantic's wire centers via collocation. As of February 20, 1998, Bell Atlantic was providing interconnection at five central office locations, but was not providing any local loops. Chu pf. at 24, 29.

154. Local loops are priced in accordance with Bell Atlantic's TELRIC cost study that was filed on July 30, 1997. These prices are being evaluated in Docket 5713. Chu pf. at 25-26.

Discussion

Based upon the uncontested evidence, Bell Atlantic has complied with Competitive Checklist item four.

Criterion Five - Local Transport

Legal Standard

Transport facilities are the trunks that connect different switches within Bell Atlantic's network or those switches with long distance carriers' facilities. Bell Atlantic must provide or generally offer transport facilities ("trunking") unbundled from switching or other services,[137] and for the purpose of carrying originating access traffic from, and terminating access traffic to, customers to whom the competitive carrier is providing local exchange service.[138]

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[137] 47 U.S.C. § 271(c)(2)(B)(v).

[138] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* Third Order on Reconsideration and Further Notice of Proposed Rulemaking ("*Local Competition Third Reconsideration Order*") at ¶¶ 38-39, FCC 97-295 (rel. Aug. 18, 1997).

In addition, since transport is a "network element" under the Act, Bell Atlantic must provide transport on an unbundled basis and in a manner that is consistent with the Act's standards for interconnection agreements.[139] Those standards require Bell Atlantic to provide nondiscriminatory access to this network element on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.[140]

Bell Atlantic must provide dedicated transport.[141] This requires Bell Atlantic to provide access to dedicated transmission facilities between its central offices or between such offices and those of CLECs, including at a minimum, interoffice facilities between end offices and serving wire centers (SWCs), SWCs and interexchange carriers' (IXCs') points of presence (POP), tandem switches and SWCs, end offices or tandems of the incumbent LEC, and the wire centers of incumbent LECs and requesting carriers.[142] Bell Atlantic must offer or provide all technically feasible transmission capabilities, such as DS1, DS3, and optical carrier levels that the competing provider could use to provide telecommunications services.[143] Bell Atlantic may not limit the facilities to which dedicated interoffice transport facilities are connected, provided such interconnection is technically feasible, nor may it restrict the use of unbundled transport facilities.[144] Bell Atlantic must, to the extent technically feasible, provide requesting carriers with access to digital cross-connect system (DCS) functionality in the same manner that Bell Atlantic offers such capabilities to interexchange carriers that purchase transport services.[145]

Bell Atlantic must also provide shared transport.[146] This service must enable CLECs to transport their traffic on the same transport facilities that Bell Atlantic uses for its own traffic.[147] Shared transport must be provided between end offices switches, between end office and tandem

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[139] 47 U.S.C. §§ 271(c)(2)(B)(ii), 251(c)(3), 252(d)(1). The Supreme Court has remanded to the FCC for further consideration its rule concerning network elements. *AT&T v. Iowa.*

[140] 47 U.S.C. § 251(c)(3).

[141] *Local Competition Third Reconsideration Order* at ¶s 22-25.

[142] 47 U.S.C. § 251(c)(3); *Local Competition First Report and Order* at ¶ 440.

[143] *Local Competition First Report and Order* at ¶ 440.

[144] *Local Competition First Report and Order* at ¶ 440; *see also* 47 C.F.R. § 51.309.

[145] A DCS aggregates and disaggregates high-speed traffic carried between competing LEC switches and incumbent LEC switches, thereby facilitating the use of cost-efficient, high-speed interoffice facilities. 47 C.F.R. § 51.319(d)(2)(iv); *Local Competition First Report and Order* at ¶ 444.

[146] *Local Competition Third Reconsideration Order* at ¶s 22-25.

[147] *Local Competition Third Reconsideration Order* at ¶ 22.

switches, and between tandem switches, in its network.[148] Shared transport must be available so that other carriers may carry originating access traffic from, and terminating access traffic to, customers to whom the requesting carrier is also providing local exchange service.[149] Bell Atlantic must permit requesting carriers who purchase unbundled shared transport to use the same routing table that is resident in Bell Atlantic's switch.[150]

Rates, terms, and conditions for shared transport must be just, reasonable, and nondiscriminatory.[151] To satisfy the nondiscrimination requirement, Bell Atlantic must demonstrate that it provides transport to CLECs under terms and conditions that are equal to the terms and conditions under which Bell Atlantic provisions such elements to itself.[152] The quality of the transport services provided also must be equal. In particular, Bell Atlantic cannot permit trunk blocking rates for facilities provided to competitors to exceed those used solely by itself.

Findings

155. Bell Atlantic offers to provide CLECs with unbundled access to common transport facilities between Bell Atlantic's tandem and end office switching systems or between two end office switching systems, as well as dedicated transport between a variety of other possible locations. Chu pf. at 29-30.

156. Transport is available with a variety of technical performance capabilities, including "DS1," DS3," "OC3," and "OC-12." Higher capacity transport is considered on a case-by-case basis. Access is provided through collocation or other mutually agreed upon points of interconnection. Additional multiplexing capabilities are also provided, such as DS1 to DS0, and Digital Cross-Connect System ("DCS"). Chu pf. at 30-31.

157. Transport is priced in accordance with Bell Atlantic's TELRIC cost study that was filed on July 30, 1997. These prices are being evaluated in Docket 5713. Chu pf. at 31-32.

158. Requests for transport utilize standard Bell Atlantic "ASR" procedures. All orders require "standard special access processing, including the creation of a Design Layout Report." Chu pf. at 32.

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[148] *Local Competition Third Reconsideration Order* at ¶ 25.

[149] *Local Competition Third Reconsideration Order* at ¶¶ 38-39.

[150] *Local Competition Third Reconsideration Order* at ¶ 45.

[151] 47 U.S.C. §§ 271(c)(2)(B)(ii), 251(c)(3).

[152] *Local Competition First Report and Order* at ¶ 315; *see also* 47 C.F.R. § 51.313(b).

159. A request for up to eight DS1 or DS3 trunks is provisioned within 15 days if facilities and equipment are available. Otherwise, negotiated intervals are established. Chu pf. at 33.

Discussion

Based upon the uncontested evidence, Bell Atlantic has complied with Competitive Checklist item five.

Criterion Six - Local Switching

Legal Standard

A switch connects end user lines to other end user lines, and connects end user lines to trunks that are used for transporting a call to another central office or to a long-distance carrier. Switches can also provide end users with "vertical features" such as call waiting, call forwarding, and caller ID, and can direct a call to a specific trunk, such as to a CLEC's operator services. Bell Atlantic must provide or generally offer local switching unbundled from transport, local loop transmission, or other services.[153] This checklist item is important because it allows a competitor without its own facilities to make use of Bell Atlantic's switch, and it also permits that competitor to offer the same features Bell Atlantic provides, such as call waiting.

In addition, since local switching is a "network element" under the Act, Bell Atlantic must provide this service on an unbundled basis and in a manner that is consistent with the Act's standards for interconnection agreements.[154] Those standards require Bell Atlantic to provide nondiscriminatory access to this network element on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.[155]

Switching services provided must include the following:

> (1) line-side facilities including the connection between a loop termination at, for example, a main distribution frame, and a switch line card;[156]

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[153] 47 U.S.C. § 271(c)(2)(B)(vi).

[154] 47 U.S.C. §§ 271(c)(2)(B)(ii), 251(c)(3), 252(d)(1). The Supreme Court has remanded to the FCC for further consideration its rule concerning network elements. *AT&T v. Iowa.*

[155] 47 U.S.C. § 251(c)(3).

[156] 47 C.F.R. § 51.319(c)(1)(i)(A); *Local Competition First Report and Order* at ¶ 412.

(2) trunk-side facilities include the connection between, for example, trunk termination at a trunk-side cross-connect panel and a trunk card;[157] and

(3) features, functions, and capabilities of the switch,[158] including:

(a) basic switching function of connecting lines to lines, lines to trunks, trunks to lines, trunks to trunks, as well as the same basic capabilities that are available to Bell Atlantic's customers, such as a telephone number, directory listing, dial tone, signaling, and access to 911, operator services, and directory assistance;[159]

(b) vertical features that the switch is capable of providing, including custom calling, CLASS features, and Centrex;[160]

(c) technically feasible customized routing functions;[161]

(d) routing tables resident in Bell Atlantic's switch, as necessary to provide nondiscriminatory access to shared transport facilities;[162] and

(e) unbundled tandem switching, including the facilities connecting trunk distribution frames to the tandem switch and all functions of the switch itself, including those that establish temporary transmission paths between two other switches.[163]

Rates, terms, and conditions for local switching must be just, reasonable, and nondiscriminatory.[164] Compliance with the nondiscrimination requirement may be evaluated through comparative performance data. In particular, where converting a customer to a CLEC requires only a software change, Bell Atlantic must be able to transfer a customer's local service to a CLEC using unbundled local switching within a time period no greater than the interval within which Bell Atlantic transfers end users between interexchange carriers.[165]

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[157] 47 C.F.R. § 51.319(c)(1)(i)(B); *Local Competition First Report and Order* at ¶ 412.

[158] 47 C.F.R. § 51.319(c)(1)(i)(C); *Local Competition First Report and Order* at ¶ 412.

[159] 47 C.F.R. § 51.319(c)(1)(i)(C)(1); *Local Competition First Report and Order* at ¶ 412.

[160] 47 C.F.R. § 51.319(c)(1)(i)(C)(2); *Local Competition First Report and Order* at ¶ 412.

[161] 47 C.F.R. § 51.319(c)(1)(i)(C)(2); *Local Competition First Report and Order* at ¶ 412.

[162] *Local Competition Third Reconsideration Order* at ¶¶ 25-29; *Ameritech Michigan Order* at ¶¶ 327-328.

[163] 47 C.F.R. § 51.319(c)(2); *Local Competition First Report and Order* at ¶¶ 425, 426.

[164] 47 U.S.C. §§ 271(c)(2)(B)(ii), 251(c)(3).

[165] 47 C.F.R. § 51.319(c)(1)(ii); *Local Competition First Report and Order* at ¶421). Where, however, provisioning of unbundled local switching will require the incumbent LEC to make physical modifications to its network, Bell Atlantic must demonstrate that it provisions this element under terms and conditions that are no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such

In evaluating whether this checklist item has been satisfied, the Board may consider how often promised installation dates are met, how well CLECs are informed of the status of orders, and how responsive Bell Atlantic is in providing access to needed support functions.

Findings

160. Bell Atlantic offers access to unbundled end office switching through line side ports, including all capabilities available in the switch for those type ports. These include connections to the distribution frame or switch line port. Standard types of line ports are available. The CLEC must purchase or otherwise provide local loops, transport, and other elements or facilities to and from the unbundled line side ports. Chu pf. at 34.

161. Bell Atlantic offers access to unbundled end office switching through trunk side ports, including all capabilities available in the switch for those type ports. DS1 trunk side ports are available, and other types of ports are available upon request. The CLEC must purchase or otherwise provide transport and other elements or facilities to and from the unbundled trunk side ports. Chu pf. at 34-35.

162. Bell Atlantic offers standard local switching functions such as connecting lines to lines and trunks to lines. The unbundled local switching network element provides access to all activated features and capabilities of the switch on an individual switch basis, for the type of port connection being utilized. This includes access to vertical features. Bell Atlantic will also provide customized routing if technically feasible so that a CLEC may, for example, route calls to trunks based upon the type of call. Chu pf. at 35-36.

163. Bell Atlantic offers standard tandem switching functions, including connecting trunks to trunks, including trunks of the CLEC. The functions are available through dedicated and shared tandem trunk ports, tandem usage, group routings and call recording. Chu pf. at 36-37.

164. Switching is priced in accordance with Bell Atlantic's TELRIC cost study that was filed on July 30, 1997. These prices are being evaluated in Docket 5713. Chu pf. at 39.

165. Unbundled local switching is available through Bell Atlantic's OSS. Requests for complex services are referred to a Service Delivery Engineer; Bell Atlantic then refers the request to a "large job committee," using the same process followed for Bell Atlantic's offerings to its own customers. Chu pf. at 39-40.

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elements to itself. 47 C.F.R. § 51.313(b); *Local Competition First Report and Order* at ¶¶ 315, 421.

166. A CLEC is responsible for testing and isolating switching trouble prior to referring a trouble report to Bell Atlantic. Chu pf. at 40.

Discussion

Based upon the uncontested evidence, Bell Atlantic has complied with Competitive Checklist item six.

Criterion Seven - 911, Directory Assistance and Operator Services

Legal Standard

The Competitive Checklist requires Bell Atlantic to provide three specific switching-related services. Bell Atlantic must provide or generally offer nondiscriminatory access to:

(1) 911 and E911 services;

(2) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(3) operator call completion services.[166]

To prove that the service is nondiscriminatory, Bell Atlantic must show that it is the same as the access Bell Atlantic provides to itself.[167]

911 and E911 database entries must be maintained with the same accuracy for CLEC customers and for Bell Atlantic customers. This includes, among other things, the obligation to populate the E911 database with competitors' end user data and perform error correction for competitors on a nondiscriminatory basis.[168] Bell Atlantic must also provide dedicated trunks from the requesting carrier's switching facilities to the applicable 911 control office, at parity with what Bell Atlantic provides to itself.[169]

Operator services and directory assistance ("OS/DA") must be unbundled on a nondiscriminatory basis at any technically feasible point,[170] and equal in quality to the access that

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[166] 47 U.S.C. § 271(c)(2)(B)(vii).

[167] *Ameritech Michigan Order* at ¶ 256.

[168] *Ameritech Michigan Order* at ¶¶ 256, 270.

[169] *Ameritech Michigan Order* at ¶ 256.

[170] 47 C.F.R. § 51.319(g); *Local Competition First Report and Order* at ¶ 534; s*ee* 47 U.S.C. § 271(c)(2)(B)(ii) and (vii).

Bell Atlantic provides to itself.[171] Bell Atlantic must allow CLECs to download all the information in Bell Atlantic's directory assistance database and to access specific listings on a "per dip" inquiry basis.[172] Where technically feasible, Bell Atlantic must make available unbranded or rebranded OS/DA services to CLECs through its OS/DA platform.[173] Bell Atlantic must provide "customized routing" capability of its local switch that allows directory assistance and operator services to be routed to the directory assistance and operator services platform of the requesting carrier.

In order to evaluate whether Bell Atlantic provides access to OS/DA in a timely and efficient manner, the Board may evaluate comparative performance data, such as the speed of answering customer requests for OS/DA.

Findings

167. As of February, 1998, Bell Atlantic offered CLECs access to 911 service on terms and conditions stated in existing interconnection agreements, the Stipulation approved by the Board in Docket 5713, and in the SGAT. Additionally, a CLEC's operator can route emergency calls to the Bell Atlantic tandem and to Bell Atlantic operators for completion to appropriate emergency personnel. Chu pf. at 41-42.

168. If a CLEC provides service through unbundled local switching, Bell Atlantic provides the capability to provide its customers with access to 911 and E-911 in the same manner that Bell Atlantic provides these services to its own end users. Chu pf. at 42.

169. Bell Atlantic offers access to operator call completion services and directory assistance services ("OS/DA") in a variety of ways under the SGAT. Bell Atlantic also offers OS/DA under interconnection agreements and under the Stipulation in Docket 5713. Bell Atlantic provides directory assistance to any facilities-based CLEC, whether or not that LEC purchases unbundled local switching. Directory assistance is offered in a branded and unbranded version from live operators, as well as an electronic database service known as "Direct Access

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[171] *See, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Second Report and Order and Memorandum Opinion and Order, ("*Local Competition Second Report and Order*") at ¶ 101 11 FCC Rcd 19392 (1996).

[172] *Local Competition Second Report and Orde*r at ¶¶ 141, 143; *Local Competition First Report and Order* at ¶ 538.

[173] *Local Competition First Report and Order* at ¶¶ 537, 971.

Directory Assistance." Bell Atlantic also offers "0 plus" and "0 minus" options to CLECs. Chu pf. at 42-44.

170. Pricing of unbundled access to directory assistance services and operator call completion services under the SGAT are set in accordance with Bell Atlantic's TELRIC cost study that was filed on July 30, 1997. These prices are being evaluated in Docket 5713. Chu pf. at 45.

171. Bell Atlantic charges two prices for resale of retail services, depending upon whether the CLEC provides its own directory assistance and operator call completion services. In either case, the discount rates charged by Bell Atlantic are those that were ordered in the arbitration with AT&T.[174] Chu pf. at 45.

172. As of February 20, 1998, no Vermont CLEC had yet requested directory assistance or operator services from Bell Atlantic. Chu pf. at 47.

173. Bell Atlantic permits CLECs to interconnect with its E-911/911 tandem to handle emergency calls. Each CLEC is responsible to enter information into the E-911 database through Bell Atlantic's OSS. Chu pf. at 46.

174. Bell Atlantic is providing E-911/911 access to Hyperion. Chu pf. at 47.

Discussion

Based upon the uncontested evidence, Bell Atlantic has complied with Competitive Checklist item seven.

Criterion Eight - White Pages

Legal Standard

White pages are the directory listings of telephone numbers of residences and businesses. A directory listing should include the subscriber's name, address, telephone number, or any combination thereof. Bell Atlantic must provide or generally offer white pages directory listings for the customers of other carriers' telephone exchange services.[175] This service ensures that white pages listings for customers of different carriers are comparable, in terms of accuracy and reliability, notwithstanding the identity of the customer's telephone service provider.

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[174] Docket 5906, order of 12/4/96

[175] 47 U.S.C. § 271(c)(2)(B)(ix); see 47 U.S.C. § 222(f)(3)(A).

In determining whether Bell Atlantic satisfies the requirements of this checklist item, the Board may consider whether the listing Bell Atlantic provides to a competitor's customers is identical to, and fully integrated with, Bell Atlantic's customers' listings, whether listings for a competitor's customers have the same accuracy and reliability as for Bell Atlantic's customers, and whether Bell Atlantic has procedures in place that are intended to ensure that the listings provided to a CLEC are comparable, in terms of accuracy and reliability, to the listings provided to Bell Atlantic's customers.

Findings

175. On request of another carrier, Bell Atlantic will include that carrier's customers' listings in the appropriate Bell Atlantic white pages printed directories for the local area in which the CLEC's customers are located. Chu pf. at 48

176. The SGAT provides a method for a CLEC to incorporate their subscribers in Bell Atlantic's directory listing services. Under this arrangement, Bell Atlantic provides at no charge a basic single line listing in the appropriate white pages directory for every end user customer of the CLEC. This is done in the same manner as for Bell Atlantic's own customers. Bell Atlantic also provides a single Yellow Pages listing for each CLEC business customer. Chu pf. at 48.

177. Bell Atlantic provides to each telecommunications carrier a number of directory books equal to that carrier's number of customers listed in the book. On an incidental basis, directories are provided at no charge upon request by a CLEC for its end user customers. Chu pf. at 48-49.

178. Bell Atlantic's SGAT offerings are consistent with such offerings provided in interconnection agreements and the stipulation approved by the Board in Docket 5713. Chu pf. at 49.

179. CLECs can enter their customers' listings through Bell Atlantic's electronic interface, which supports both basic and optional listing services, such as individual listings. Chu pf. at 50.

180. Bell Atlantic has provided one CLEC with 21 White Pages listings in Vermont directories. Chu pf. at 51.

Discussion

By offering directory listings at no charge, Bell Atlantic exceeds the requirements of the Competitive Checklist. Based upon the uncontested evidence, Bell Atlantic has complied with Competitive Checklist item eight.

Criterion Nine - Numbering Administration

Legal Standard

Telephone numbers are presently assigned to telecommunications carriers based on the first three digits of the local number known as "NXX" codes. Bell Atlantic must provide or generally offer nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers.[176] After the date by which telecommunications numbering administration guidelines, plan, or rules are established, Bell Atlantic must comply with such guidelines, plan, or rules.[177] This checklist item ensures that competing providers have the same access to new telephone numbers as does Bell Atlantic itself.

To fulfill the nondiscrimination obligation for telephone numbers, Bell Atlantic must provide CLECs with the same access to new NXX codes within an area code that Bell Atlantic enjoys. Bell Atlantic may only charge other telecommunications carriers fees for the assignment of central office ("CO") codes if it charges one uniform fee for all carriers, including itself and its affiliates.[178] Charges for activating CO codes may not be unjust, discriminatory, or unreasonable,[179] and Bell Atlantic may not delay or deny CO code assignments for competing providers of telephone exchange service.[180] In summary, Bell Atlantic must "apply identical standards and procedures for processing all numbering requests, regardless of the identity of the party making the request."[181]

In determining whether Bell Atlantic has met this nondiscrimination requirement, the Board may consider such information as comparative performance data and whether Bell Atlantic has adhered to industry guidelines.[182] After the administrator function has been shifted to the

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[176] The reference to "nondiscriminatory" in checklist item (ix) is similar to the requirement in section 251(b)(3) that LECs provide nondiscriminatory access to telephone numbers to competing providers by permitting competing providers access to telephone numbers that is identical to the access that the LEC provides itself. 47 C.F.R. § 51.217(c)(1)*; Local Competition Second Report and Order* at ¶ 106.

[177] 47 U.S.C. § 271(c)(2)(B)(ix).

[178] *Local Competition Second Report and Order* at ¶¶ 328, 332-33

[179] Local Competition Second Report and Order at ¶ 333

[180] 47 U.S.C. §§ 251(b)(3), 202(a); *Local Competition Second Report and Order* at ¶ 334.

[181] *Local Competition Second Report and Order* at ¶ 333.

[182] These include the Central Office Code Administration Guidelines (Central Office Code (NXX) Assignment Guidelines (INC 95-0407-008)(April 1997)) and the NPA Code Relief Planning and Notification Guidelines (NPA Code Relief Planning and Notification Guidelines (INC 97-0404-016)(April 1997)), where applicable.

North American Numbering Plan Administrator, Bell Atlantic must prove that all applicable guidelines are being followed.

On September 30, 1997, Bell Atlantic was the numbering administrator in Vermont. The present findings, therefore, apply to that date.[183]

Findings

181. On September 30, 1997, Bell Atlantic was the numbering administrator for Vermont. Chu pf. at 51.

182. On September 30, 1997, Bell Atlantic provided, under the SGAT, nondiscriminatory access to telephone numbers. Services were provided in accordance with the Central Office Code Assignment Guidelines and the NPA Code Relief Planning Guidelines. This obligation is restated in Bell Atlantic's interconnection agreements. Chu pf. at 51-52.

183. On September 30, 1997, Bell Atlantic provided numbering administration at no charge. Chu pf. at 53.

184. On September 30, 1997, CLECs seeking NXX codes were required to complete a form. Bell Atlantic then determined whether the request complied with applicable guidelines. An application that met the guidelines was normally granted an NXX within ten working days from receipt. Chu pf. at 53.

185. As of February 20, 1998, Bell Atlantic had provided 20 NXX codes to one CLEC. Chu pf. at 54.

Discussion

This checklist item has become largely irrelevant since Lockheed Martin has now become the numbering administrator for Vermont. However, as of September 30, 1997, based upon the uncontested evidence, Bell Atlantic has complied with Competitive Checklist item nine.

Criterion Ten - Databases and Signaling

Legal Standard

Databases and signaling systems are used for billing and collection or the transmission, routing, or other provision of a telecommunications service. Bell Atlantic must make available nondiscriminatory access to databases and associated signaling necessary for call routing and

[183] In late 1998, Lockheed-Martin assumed control of numbering administration for Vermont.

completion. This checklist item includes signaling networks, call-related databases and service management systems.

Signaling networks, including signaling links and signaling transfer points, give a competitive carrier the ability to send signals between its switches (including unbundled switching elements), between its switches and Bell Atlantic's switches, and between its switches and those third party networks with which Bell Atlantic's signaling network is connected.[184]

Call-related databases are databases other than OSS used in signaling networks for the transmission, routing, billing and collection of calls, or other aspects of providing telecommunications service. They include: line-information databases ("LIDB") (*e.g.*, for calling cards); toll-free databases (*i.e.*, 800, 888); downstream number portability databases (*i.e.*, Bell Atlantic's own database containing number portability routing information); and Advanced Intelligent Network (AIN) databases.[185]

Service Management Systems are used to create, modify, or update information in call-related databases that are necessary for call routing and completion.[186]

Bell Atlantic must provide or generally offer nondiscriminatory access to databases and associated signaling necessary for call routing and completion.[187] In addition, since access to databases and signaling is a "network element" under the Act, Bell Atlantic must provide this service on an unbundled basis and in a manner that is consistent with the Act's standards for interconnection.[188] Those standards require Bell Atlantic to provide nondiscriminatory access to this network element on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.[189]

To fulfill the nondiscrimination obligation, Bell Atlantic must demonstrate that it provides CLECs with the same access to these call-related databases and associated signaling that it provides to itself. This checklist item ensures that competing providers have the same ability to

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[184] 47 C.F.R. § 51.319(e)(1); *Local Competition First Report and Order* at ¶¶ 479-483.

[185] 47 C.F.R. § 51.319(e)(2); *Local Competition First Report and Order* at ¶¶ 484-492.

[186] 47 C.F.R. § 51.319(e)(3); *Local Competition First Report and Order* at ¶¶ 493-500.

[187] 47 U.S.C. § 271(c)(2)(B)(x).

[188] 47 U.S.C. §§ 271(c)(2)(B)(ii), 251(c)(3).

[189] 47 U.S.C. § 251(c)(3).

transmit, route, complete and bill for telephone calls as Bell Atlantic.[190] Bell Atlantic must also provide a requesting telecommunications carrier with access to call-related databases and service management systems in a manner that complies with section 222 of the Act.[191] CLECs also must have nondiscriminatory access to the various functions of Bell Atlantic's operations support systems in order to obtain access to databases and signaling in a timely and efficient manner.

Useful information to determine compliance with this checklist item includes a comparison of the manner in which Bell Atlantic obtains access to its databases and signaling network and the manner it which it provides, or would provide, if requested, such access to competing providers. If there are any differences, Bell Atlantic should provide an explanation. Other useful information includes comparative performance data, and may include the review and justification of all exceptions to equal access to information.

Findings

186. Under the SGAT, CLECs can obtain access to Bell Atlantic's signaling links and signal transfer points. This permits CLECs to use Bell Atlantic's "Signaling System 7" ("SS7") signaling network on a shared or dedicated basis for signaling between their switches and BA's switches, and between their switches and the networks of other carriers. Access is offered both through interconnection and as an unbundled network element. Chu pf. at 55.

187. Bell Atlantic offers under the SGAT access to call related databases. These include the "LIDB," the Toll Free Calling database, and the AIN database. Access to these databases is provided through the out-of-band SS7 signaling network. These offerings permit CLECs to use Custom Local Area Signaling Services ("CLASS") between Bell Atlantic customers and CLEC customers. Chu pf. at 55-56.

188. Access to Bell Atlantic's SS7 network is provided to CLECs on the same basis that it provides such access to itself. When a CLEC uses unbundled local switching it can use Bell Atlantic's service control point ("SCP") in the same manner that Bell Atlantic does. A CLEC with its own switch also may get access to the SCP to obtain call-related database-supported services to customers using the CLEC switch. Chu pf. at 55-57.

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[190] 47 U.S.C. § 271(c)(2)(B)(x).

[191] 47 C.F.R. § 51.319(e)(2)(vi) and (3)(v).

189. Bell Atlantic will consider CLEC requests for additional arrangements for access to call-related databases and signaling through interconnection, and on an unbundled basis. Chu pf. at 57.

190. When a CLEC seeks to interconnect its switch with Bell Atlantic's signaling network, both carriers participate in exercises to ensure that the CLEC's signaling is compliant with industry guidelines and standards. Chu pf. at 59.

191. Pricing of access to databases and signaling systems under the SGAT are set in accordance with Bell Atlantic's TELRIC cost study that was filed on July 30, 1997. These prices are being evaluated in Docket 5713. Chu pf. at 58.

192. As of February 20, 1998, no Vermont CLEC used Bell Atlantic's databases and associated signaling systems necessary for call routing and completion. One CLEC did use SS7 links from Bell Atlantic, but it used another provider's SS7 database. Chu pf. at 60.

Discussion

Based upon the uncontested evidence, Bell Atlantic has complied with Competitive Checklist item ten.

Criterion Eleven - Number Portability

Legal Standard

Number portability enables consumers to retain their phone number when they change local telephone companies, provided they retain the same central office and rate center boundary. Number portability is important to CLECs because it permits new customers to change service providers without being forced to change their telephone number thus eliminating a barrier to consumers' switching providers. Checklist item eleven creates different standards that apply sequentially.

Until Bell Atlantic deploys "long-term number portability" within a central office, Bell Atlantic must provide or generally offer interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. Regardless of the method Bell Atlantic uses, it must respond as soon as reasonably possible following a specific

request from a competitor for number portability.[192] Bell Atlantic need not use a method that is unduly burdensome, after considering the extent of network upgrades needed to provide that particular method, the cost of such upgrades, the business needs of the requesting carrier, and the timetable for deployment of a long-term number portability. Bell Atlantic's rates for interim number portability must comply with the FCC's criteria for competitive neutrality.[193]

Long-term number portability must be deployed in the state in accordance with the implementation schedule established by the FCC.[194] For any "Metropolitan Statistical Areas" in Vermont that are part of the FCC's phased implementation schedule, relevant information would include: Bell Atlantic's schedule for intra- and inter-company testing of a long-term number portability method; the current status of the switch request process, including identification of the particular switches for which Bell Atlantic is obligated to deploy number portability and the status of deployment in requested switches; and the schedule under which Bell Atlantic plans to provide commercial roll-out of a long-term number portability method in specified central offices in the relevant state.[195]

Both long-term and interim number portability must be provided in a nondiscriminatory manner consistent with the definition of number portability set forth in law.[196] CLECs also must have nondiscriminatory access to the various functions of Bell Atlantic's operations support systems in order to request and obtain number portability in a timely and efficient manner.[197]

In evaluating Bell Atlantic's compliance with this checklist item, the Board may consider whether all competitors' customers are able to use number portability without disruptions in service.

Findings

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[192] 47 C.F.R. § 52.27; *Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking *("Telephone Number Portability First Report and Order*") at ¶¶ 110-116, 11 FCC Rcd 8352 (1996).

[193] 47 C.F.R.§ 52.29.

[194] 47 C.F.R. § 52.23; *Telephone Number Portability*, First Memorandum Opinion and Order on Reconsideration("*Telephone Number Portability First Reconsideration Order")* at ¶¶ 48-126 and App. B, 12 FCC Rcd 7236 (1997); *Ameritech Michigan Order* at ¶ 342.

[195] *Ameritech Michigan Order* at ¶ 342.

[196] 47 U.S.C. § 153(30). 47 C.F.R § 52.23; *Telephone Number Portability First Report and Order* at ¶¶ 46-63, 110-116; *Telephone Number Portability First Reconsideration Order* at ¶¶ 11-47.

[197] *Ameritech Michigan Order* at ¶ 342.

193. Bell Atlantic offers an interim solution to number portability under terms described in the SGAT. Bell Atlantic and the CLEC jointly select a specific arrangement to accomplish portability. The options from Bell Atlantic include remote call forwarding and route indexing trunk arrangements. CLECs can use direct inward dialing at their own discretion to perform interim number portability. Bell Atlantic is prepared to offer interim number portability at all of its central offices. Chu pf. at 61, 63.

194. Remote call forwarding involves reprogramming the switch to forward all incoming calls to a second number. It utilizes two telephone numbers for each affected customer. Some "CLASS" services that rely upon the telephone number of the party originating the call may not work with this method. Chu pf. at 61, 64.

195. Route indexing relies upon direct trunks, connecting a Bell Atlantic end office with a CLEC end office. Incoming calls to CLEC customers are routed through these trunks to the CLEC switch. This method requires the use of only one telephone number per customer, but may be inefficient for low usage routes since it requires use of dedicated end office trunks. Chu pf. at 62.

196. Direct inward dialing is similar to route indexing, except that it cannot be provided with SS7 signaling. Some advanced "CLASS" features are not available using this method, and it is less efficient than other methods. Chu pf. at 62, 64.

197. Bell Atlantic has proposed a competitively neutral method of cost recovery of the costs of interim number portability based on the retail revenue of each telecommunications carrier. BA shares interstate access charges with carriers obtaining number portability functions. Chu pf. at 62-63.

198. As of February, 1998, long-term number portability was not available from BA. However, this is not presently required by FCC orders. Permanent portability solutions must be available within the 100 largest Metropolitan Statistical Areas in response to specific requests from telecommunications carriers. In Vermont, permanent or long-term number portability is not required prior to July 1, 1999. Chu pf. at 66.

199. As of February 20, 1998, Bell Atlantic had ported 18 numbers to one telecommunications carrier. Chu pf. at 67.

Discussion

Based upon the uncontested evidence, Bell Atlantic has complied with Competitive Checklist item eleven.

Criterion Twelve - Local Dialing Parity

Legal Standard

Local dialing parity permits customers to make local calls in the same manner, and using the same number of digits, regardless of their selection of service provider.[198] This ensures that consumers are not inconvenienced in making calls when they subscribe to a competing provider for local telephone service. Bell Atlantic must provide or generally offer nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity.[199] This obligation applies not only to directly dialed calls, but also to operator services, directory assistance and directory listings, with no unreasonable dialing delays.

In addition, Bell Atlantic must provide this service on an unbundled basis and in a manner that is consistent with the Act's standards for interconnection agreements. Those standards impose the duty to provide dialing parity to providers of telephone exchange service and telephone toll service with "nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays."[200]

In evaluating BA's performance, the Board may consider whether customers of a competing provider are able to dial the same number of digits to make a local telephone call, notwithstanding the identity of the customer's, or the called party's, local telephone service provider. The Board may consider whether arrangements regarding calling extended area local calling that Bell Atlantic offers to customers are "available" to the CLEC's customers through the mechanism of negotiated interconnection agreements between Bell Atlantic and CLECs at just

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[198] Local dialing parity means that a carrier other than Bell Atlanticis able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications service provider of the customer's designation from among 2 or more telecommunications service providers (including such local exchange carrier). 47 U.S.C. § 153(15).

[199] 47 U.S.C. § 271(c)(2)(B)(xii). The Eighth Circuit has vacated the FCC's dialing parity rules, "but only to the extent that they apply to intraLATA telecommunications." *See People of the State of Cal. v. FCC*, 124 F.3d 934, 943 (8th Cir. 1997); *but see, AT&T v. Iowa* (FCC has authority to adopt rules to local competition provisions of Communications Act).

[200] 47 U.S.C. §§ 271(c)(2)(B)(xii), 251(b)(3).

and reasonable rates. Finally, the dialing delay experienced by the customers of a competing provider should not be greater than that experienced by customers of BA.[201]

Findings

200. Bell Atlantic customers can make local calls to CLEC customers, and CLEC customers can make local calls to Bell Atlantic customers, using the same number of digits as calls from Bell Atlantic customers to Bell Atlantic customers. No unreasonable delays are expected to be encountered. Chu pf. at 68-70.

201. Local dialing parity also includes telephone numbers, directory assistance and operator services and directory listings. Chu pf. at 68.

202. The SGAT provides for local dialing parity, and the service is an integral part of interconnection arrangements between Bell Atlantic and CLECs. No charges are proposed for local dialing parity. Chu pf. at 69-70.

203. As of February 20, 1998, Bell Atlantic was providing local dialing parity to one CLEC. Chu pf. at 71.

Discussion

Based upon the uncontested evidence, Bell Atlantic has complied with Competitive Checklist item twelve.

Criterion Thirteen - Reciprocal Compensation

Legal Standard

Reciprocal compensation is an arrangement by which Bell Atlantic and competitive carriers, including wireless carriers, compensate each other for the cost of transporting and terminating local telecommunications traffic over their respective networks.

Bell Atlantic must provide or generally offer reciprocal compensation arrangements in accordance with the Act's standards for interconnection agreements.[202] Those standards require Bell Atlantic to establish just and reasonable compensation rates. "Just and reasonable" in this context means that reciprocal compensation meets two tests:

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[201] 47 U.S.C. § 271(c)(2)(B)(xii).

[202] 47 U.S.C. § 271(c)(2)(B)(xiii).

(i) that terms and conditions of interconnection agreements and any SGAT provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the others' network facilities; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[203]

Nothing, however, in the Act prevents carriers from entering mutual compensation arrangements through offsets of reciprocal obligations, nor from agreeing to "bill-and-keep" arrangements.[204]

In evaluating compliance with this checklist item, the Board may review the details of interconnection agreements with respect to reciprocal compensation and may determine whether all obligations have been met. The Board may also consider whether adequate and accurate records are kept and available to all applicable parties. Finally, the Board may consider whether reciprocal compensation is denied for a particular type of traffic and, if so, whether this constitutes an anti-competitive or discriminatory practice.

Findings

204. Under the SGAT, Bell Atlantic charges for termination of local calls originated by customers of a CLEC. These are reciprocal compensation charges and permit Bell Atlantic and CLECs to recover the costs incurred in transporting and terminating local calls that originate on each other's network. Chu pf. at 72.

205. Reciprocal compensation arrangements are also contained in BA's interconnection agreements. Chu pf. at 72.

206. Bell Atlantic offers reciprocal compensation to Commercial Mobile Radio Service providers under the SGAT and under interconnection agreements. Chu pf. at 73.

207. Pricing of reciprocal compensation under the SGAT are set in accordance with BA's TELRIC cost study that was filed on July 30, 1997. These prices are being evaluated in Docket 5713. Chu pf. at 74.

Discussion

Based upon the uncontested evidence, Bell Atlantic has complied with Competitive Checklist item thirteen.

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[203] 47 U.S.C. § 252(d)(2).

[204] 47 U.S.C. § 252(d)(2). A "bill and keep" arrangement is an agreement with another carrier whereby neither Bell Atlanticnor the other carrier charges for terminating local traffic that originates on the other carrier's network. The Board has previously adopted bill and keep as the default compensative arrangement in Vermont. Docket 5906, Order of 12/4/96 at 5; Docket 5713, Phase I, Order of 5/29/96 at 78-80.

Criterion Fourteen - Resale

Legal Standard

"Resale" is the right of a CLEC to purchase services from Bell Atlantic and to resell those services to the competitor's customer. The right to resell is important to CLECs because it establishes a mode of entry into the local market for carriers who have not deployed their own facilities.

Bell Atlantic must provide or generally offer telecommunications services for resale.[205] In addition, Bell Atlantic must provide this service in a manner that is consistent with the Act's standards for interconnection agreements in Section 252(d). Those interconnection standards impose the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.[206] The obligation to offer services for resale includes "contract service arrangements" (CSAs) at a wholesale discount.[207]

Bell Atlantic may not impose "unreasonable or discriminatory conditions or limitations" on resale. Resale restrictions, with limited specified exceptions, are presumptively unreasonable.[208] Nevertheless, there are some narrowly tailored circumstances where limitations on resale are acceptable:

- Cross-class selling. Where Bell Atlantic offers a particular service at retail only to a category of subscribers, the Public Service Board may permit Bell Atlanticto prohibit resale of that service to other categories of subscribers.[209] For example, the Board might prohibit resale of residential service to business customers.

- Short-term promotions. Short-term (90 days or less) promotional prices do not constitute retail rates for the underlying services, and, therefore, are not subject to the wholesale obligation.[210]

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[205] 47 U.S.C. § 271(c)(2)(B)(xiv).

[206] 47 U.S.C. §§ 271(c)(2)(B)(xiv), 251(c)(4)(A).

[207] *BellSouth South Carolina Order* at ¶s 215-218.

[208] 47 U.S.C. §§ 271(c)(2)(B)(xiv), 251(c)(4)(B); *Local Competition First Report and Order* at ¶ 939; *see* 47 C.F.R. § 51.613(a)(1).

[209] The Board's decision must be consistent with FCC regulations. 47 U.S.C. § 251(c)(4)(B); *Local Competition First Report and Order* at ¶ 962.

[210] 47 C.F.R. § 51.613(a)(1) and (2); *Local Competition First Report and Order* at ¶ 950.

Bell Atlantic must provide nondiscriminatory access to its OSS functions to CLECs that resell BA's services. Bell Atlantic can demonstrate that it is providing non-discriminatory access to its OSS functions for resale by submitting performance data such as the status of resale orders, the time it takes to fulfill a service request for a resale order, and the number of resale orders completed on time.

Federal regulations require that the wholesale price for BA's services to be resold be set at what is essentially an avoided cost standard.[211] Where Bell Atlantic offers a volume-based discount to retail customers, it must also offer that discount to resellers based upon the reseller's volume;[212] The avoidable costs for a service with volume-based discounts may be different, however, than without volume contracts.[213]

General Findings

208. The SGAT permits the resale of most Bell Atlantic services available on a retail basis. Generally, all services offered to end users are available for resale, except public telephone service. Chu pf. at 8, 76.

209. Bell Atlantic does not offer service for resale on a stand alone basis when that service is offered at retail only in connection with basic dial tone service. Exh. Board C-1 (SGAT) § 6.2.1(E); Chu pf. at 76.

210. Under the SGAT, Bell Atlantic will, upon request, reroute a reselling CLEC's operator service and directory assistance calls to an alternate operator service provider or rebrand such calls according to the reseller's instructions. Chu pf. at 76.

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[211] Prices must be equal to the "retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any avoidable costs such as marketing, billing and collection." 47 U.S.C. §§ 271(c)(2)(B)(xiv), 251(d)(3).

[212] The Board reached a similar conclusion in Docket 5906, Order of 12/4/96 at 32

[213] *Local Competition First Report and Order* at ¶ 951. It is presumptively unreasonable for incumbent LECs to require individual customers of a reseller to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimal level of demand. *Local Competition First Report and Order* at ¶ 953.

211. Bell Atlantic supports resale through a resale service center available 24 hours a day, seven days a week. Chu pf. at 78.

212. Resellers are responsible for testing and isolation of trouble conditions on resold lines. All aspects of maintenance and repair of resold lines are treated on the same basis as for BA's own customers. Chu pf. at 79.

213. As of February 20, 1998, Bell Atlantic was not providing any resale services to Vermont CLECs. However, a resale agreement did exist on that date, with CTC Corporation.[214] Chu pf. at 80; tr. 6/17/98 at 19 (Raymond).

214. In 1997, Bell Atlantic in its entire region provisioned approximately 162,000 resale lines. Bell Atlantic has more than 41 million access lines, including switched and special lines. Therefore, Bell Atlantic has provisioned approximately 0.4 percent of its lines for resale. Miller/DeVito pf. at 12; Federal Communications Commission, *Statistics of Communications Common Carriers, 1996-97 edition*, Table 2-10 (showing data for all Bell Atlantic companies).

215. Bell Atlantic offers resold services at discount rates ranging between 18.2% for residence services and 27.66% for business services. These discounts are based upon an avoided cost analysis that was approved in the AT&T arbitration. Chu pf. at 78; Docket 5906, Order of 12/4/96.

Discussion

Of all the fourteen points in the checklist, the DPS poses its broadest challenge to BA's resale policies and practices. The DPS asks for prospective relief in three areas: toll resale; voice messaging resale; and special contracts. In each area, the DPS argues that policy changes are necessary to bring Bell Atlantic into compliance with the 1996 Act. In addition, the DPS raises issues concerning confidentiality of proprietary information and the failure of Bell Atlanticto prescribe fixed installation periods for certain large resale orders.

Toll Resale

The DPS challenges BA's policy of not offering toll resale to CLECs unless the underlying customer is also purchasing resold dial tone. The DPS alleges that this policy violates the Act

[214] Since that date, the Board has approached a number of other interconnection agreements with terms and conditions that include resale.

because toll is a telecommunications service that must be made available for resale and also because it imposes an unreasonable restriction on resale. The DPS requests a Board order directing Bell Atlantic to offer toll for resale to all customers.

Bell Atlantic responds that it does not offer "stand-alone" toll to customers at retail, and therefore should not be required to resell it.[215] By this, Bell Atlantic means to argue that toll is not a telecommunications service unless it is used in conjunction with some form of line that connects the user to the network that provides the end-to-end toll service. Bell Atlantic notes that its tariff does not limit the availability of any of its toll services to Bell Atlantic local exchange customers. Rather, Bell Atlantic asserts its toll service is available to customers throughout the state under tariff.[216]

Findings

216. Bell Atlantic does not offer its toll service for resale unless the reseller also purchases basic dial tone for the same customer. Raymond pf. at 11; tr. 6/18/98 at 57-61 (Chu).

217. Bell Atlantic has never received a request for resale of toll for customers who are not receiving BA's resold dial tone services. Chu reb. pf. at 13.

218. BA's tariff does not limit the retail availability of solely toll services to Bell Atlantic local exchange customers. To the contrary, under Bell Atlantic Tariff No. 20, BA's toll service is available to customers throughout the state, including customers of a "miscellaneous common carrier" such as an independent telephone company. Bell Atlantic Tariff No. 20, part A, § 9.1.1.

219. Bell Atlantic provides its toll service products statewide, including to customers who take local exchange service from independent local telephone companies ("ITCs"). When an ITC customer uses BA's toll service, Bell Atlantic pays access to the ITC. Tr. 6/18/98 at 60-61 (Chu).

Conclusions

A threshold question is whether toll is a separate "telecommunications service" at all. We conclude that it is.

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[215] Bell AtlanticReply Brief at 11.

[216] Tariff No. 20, part A, Section 9.1.1 provides

> A. This tariff applies to MTS furnished or made available by the Telephone Company, over facilities, wholly within or partly within and partly without the State of Vermont, between two or more points within the State of Vermont where the respective rate centers of such points are also located in said state, ...
> B. Service is available to and from customers of a miscellaneous common carrier with which arrangements have been made for the interchange of telephone traffic . . . ."

First, toll is a telecommunications service, as defined by federal law.[217] This is consistent with usage in Vermont. Bell Atlantic presently offers its toll service to thousands of customers who receive dial tone service from Vermont's independent telephone companies. That Bell Atlantic is offering toll service to these customers can be seen, if in no other way, from the fact that Bell Atlantic pays access charges to each independent company when that company's customers use the Bell Atlantic toll service. We are not persuaded that this situation changes in any way because those independent companies "concur" in BA's tariff.[218]

The Board has previously differentiated toll service from basic exchange service. In Docket 5713, the Board defined basic exchange service to encompass access to toll service.[219] The FCC has reached a similar conclusion.[220] Therefore, we conclude that toll service is a separate service.

Since toll service is a separate telecommunications service, it must be offered for resale.[221] The FCC has ruled that restrictions on resale are presumptively invalid.[222] Therefore, the burden is on Bell Atlantic to show that its restriction on resale of toll is reasonable, and Bell Atlantic has not carried this burden.[223]

At the present time, the question of whether toll represents a separate service may not have much significance for customers. This issue will make a practical difference to a customer with two characteristics. First, the customer must be a CLEC customer who is not purchasing resold Bell Atlantic dial tone. This means the customer must be purchasing dial tone from a UNE-based CLEC or a facilities-based CLEC. Second, the customer must desire to buy toll from the CLEC which, although it is providing dial tone through UNEs or its own facilities, must also desire to offer the customer resold Bell Atlantic toll service. The record does not disclose how

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[217] "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153 (43).

[218] See, tr. 6/18/98 at 60 (Chu).

[219] Docket 5713, Phase I, Order of 5/29/96 at 65.

[220] Federal-State Joint Board on universal Service, Report and Order, CC Docket No. 96-45, FCC 97-157 (rel. May 8, 1997) at ¶ 390.

[221] 47 U.S.C. § 271(c)(2)(B)(xiv).

[222] 47 C.F.R. § 51.605(b); Local Competition First Report and Order at ¶ 939.

[223] In reaching this conclusion, we are mindful that there may be technical limitations to providing toll for resale. However, Bell Atlantichas not brought any such limitations to light, and we assume that there are no relevant technical limitations.

many CLECs have these characteristics, but we consider it unlikely that any presently exist in Vermont. The record does show that no CLEC has ever made a request to resell toll on a stand-alone basis.

Moreover, it is possible that the availability of toll resale will have a greater effect in the future. Resale has been generally considered one tool to deter anti-competitive pricing policies by incumbent LECs. Thus, if a LEC offers a toll service, such as business optional calling plans, at rates that may prevent competitors that must pay access charges from effectively competing, those competitors could resell the toll service, incorporating an avoided-cost-based discount. As the market becomes more competitive, toll resale, coupled with an imputation standard, will provide the protections against such anti-competitive pricing.

We conclude that BA's practice of limiting resale of its toll service solely to customers who receive BA's underlying basic service is an unreasonable restriction. We recommend that the Board require Bell Atlantic to amend its SGAT so as to offer unrestricted resale of toll service.

Voice Messaging Resale

Bell Atlantic does not offer or make voice messaging service available for resale. The DPS argues that voice messaging is a "telecommunications service" under the Act; and as such, must be offered for resale at a discount and cannot be subjected to unreasonable restrictions. Since voice messaging is often bundled by carriers with other telecommunications services, the DPS argues that any restriction or condition imposed on resale of voice messaging is presumptively unreasonable restriction on resale in violation of the Act. Finally, the DPS contends that failing to make voice messaging services available for resale at wholesale rates raises a barrier to entry for new market entrants, particularly entrants seeking to serve the residential and small business market segments.

Bell Atlantic maintains that voice messaging is not "telecommunications" under the act, and thus is not subject to the requirement to offer telecommunications services for resale. Rather, Bell Atlantic maintains that voice messaging is an "information service," a class of services that, for purposes of the Act, equates to "non-telecommunications" services. Bell Atlantic also asserts that a CLEC reselling Bell Atlantic's local exchange services should be able to provide its own voice messaging services to its local service customers, using the same state tariffs that Bell Atlantic charges itself when providing voice messaging to its own customers.

Findings

220. Bell Atlantic does not offer voice messaging service for resale. Raymond pf. at 12.

221. Demand is growing for voice messaging services among small business and residential users. Raymond pf. at 12.

222. The telecommunications services that Bell Atlantic uses to provide voice messaging are available under the SGAT as UNEs, and may also be acquired pursuant to interconnection agreements. Chu reb. pf. at 15.

Conclusions

We suspect that the availability of voice mail from one's telecommunications provider may be an expectation of a majority of consumers. Although voice answering and recording machines are widely available in retail stores, many consumers elect to purchase voice mail from their dial tone telecommunications carrier in part no doubt because the LEC-based service offers capabilities not available through customer premises equipment. The record shows that demand is growing for this service from LECs. The record is silent as to whether consumers would be deterred from selecting a CLEC that cannot offer voice messaging, although we suspect that the absence of voice messaging service may make it more difficult for CLECs to compete successfully using a resale strategy. The record shows that CLECs can acquire telecommunications services that can be used to provide voice messaging. The record does not disclose, however, whether those services can be effectively combined nor whether they are prohibitively expensive. The record also does not show whether the absence of wholesale voice messaging is a practical impediment to CLEC success.

We note that several state commissions have ordered that voice messaging be available for resale. Those states are Alabama;[224] California;[225] Florida;[226] Kentucky;[227] Oregon;[228] and Wyoming.[229]

The threshold question is whether voice messaging is a "telecommunications service" under the Act, an "information service," or both. Initially, we observe that voice messaging appears to be "telecommunications" since it reproduces the voice of the sender, at a later time, "without change in the form or content of the information as sent and received"[230] There is a change in the time of delivery of the voice information, but not in its form or content. Since voice messaging is telecommunications, and since it is a service, it is also a "telecommunications service,"[231] and it must be made available for resale.[232]

There is one other consideration, however. Voice messaging involves the storage of information for later retransmission. For this reason it also meets the definition of an "information

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[224] *Arbitration Between AT&T Communications of the South Central States, Inc. and GTE Communications of the South, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Docket No. 25704 (Alabama Public Service Commission Feb. 12, 1997)

[225] *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service; Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service*, Rulemaking No. 95-04-043, Investigation No. 95-04-044, Decision No. 97-08-059 (California Public Utilities Commission Aug. 1, 1997), *pet. for rehearing pending.*

[226] *MCI Telecommunications Corporation*, Docket No. 961230-TP, Order No. PSC-97-0294-FOF-TP (Florida PSC March 14, 1997), *recon*. Order No. PSC-97-1059-FOF-TP (released Sept. 9, 1997).

[227] *Petition by MCI for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE South Incorporated Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Case No. 96-440 (Kentucy Public Service Commission Feb. 4, 1997).

[228] *Petition of MCImetro Transmission Services for Arbitration of Interconnection Rates, Terms and Conditions with GET Northwest Inc. Pursuant to 47 U.S.C. § 252(b)*, ARB 9, Order No. 97-038 (Oregon Public Utility Commission Feb. 3, 1997).

[229] *Arbitration by the Public Service Commission of an Interconnection Agreement Between US WEST Communications, Inc. and AT&T Communications of the Mountain States, Inc. Under 47 USC 252*, Docket Nos. 70000-TF-96-319, 72000-TF-96-95 (Wyoming Public Service Commission April 23, 1997).

[230] "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153 (43).

[231] "Telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153 (46).

[232] 47 U.S.C. § 251(c)(4)(A).

service" under the Act.[233] The FCC has ruled definitively that a service that is an information service cannot be a telecommunications service.[234]

Prior to the enactment of the 1996 Act, the FCC classified voice messaging services as "enhanced" services.[235] The FCC has determined that the definition of "information services" under the 1996 Act includes those services it previously classified as "enhanced services"[236] and that "information services" are not also "telecommunications services" because the two definitions under the 1996 Act are "separate, non-overlapping categories."[237] Accordingly, we conclude that voice mail and voice messaging services are information services, not telecommunications services, and, thus, are not subject to the resale obligation under the Competitive Checklist.[238]

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[233] The Act defines "information service as meaning:

> a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service. 47 U.S.C. § 153 (20).

[234] *Bell South Louisiana II Order*, at ¶ 314.

[235] *See Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, Report and Order, 104 FCC 2d 958 (1986).

[236] *Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955-58 (1996).

[237] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, FCC 98-67 (rel. April 10, 1998) at paras. 39, 44; *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket Nos. 96-115 and 96-149, 13 FCC Rcd 8061, 8095-96 (1998) ("*CPNI Order*") (call answering, voice mail or messaging, voice storage and retrieval services, fax store and forward, and Internet access services are information services).

Note, however, the FCC has recently decided that dial-up Internet calls are interstate telecommunications from end to end. This decision applies both to the dial-up portion of the call from the customer's premises to the ISP, and also the Internet packet switched portion of the call. To the extent that the decision upholds FCC jurisdiction over the Internet portion as interstate telecommunications, it seems necessary to conclude that Internet calls are also telecommunications services. at *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Declaratory Ruling in CC Docket 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, Feb. 26, 1999, FCC 99-38 ¶ 18.

[238] 47 U.S.C. § 271(c)(2)(B)(xiv); *Bell South Louisiana II Order*, at ¶ 314. We have previously ruled that questions of law in this docket will be based upon state law. In this particular instance, however, that choice of law principle has only limited value. Here the narrow question is not whether Vermont would balance competing policy considerations in a way that differs from the balance struck by the FCC. Since the ultimate issue in this docket is compliance with the federally prescribed Competitive Checklist, the narrow question here is what the Congress intended in 1996. There would be little to gain by developing a "Vermont view" on the meaning of "telecommunications service" under the federal Act. Since the FCC has already ruled on the Congressional intent (and unless that ruling is overturned by an appellate court of the Congress) we think that FCC determination should at the least be highly persuasive here. In this context at least, federal and state law should agree on the meaning of the Competitive Checklist.

We considered but ultimately rejected recommending that the Board require the resale of voice messaging as a matter of state law. Given a proper factual background, we believe that the Board's authority is sufficient on this point. If the Board were to find that the status quo presents practical economic impediments to realistic competition, we believe the Board has the authority to order Bell Atlantic to resell voice messaging.[239]

The record is not sufficient, however, to make such a recommendation. The record does not show that consumers seeking telecommunications services are being deterred from switching to a CLEC that does not offer voice mail. Nor does the record show that competitors offering resold services are unable to provide cost-effective voice mail alternatives with equivalent functionalities.[240] Therefore, we do not recommend that the Board, at this time, exercise its state law authority to order resale of voice messaging. This should not be interpreted as a ruling on the merits of the issue, however, and if the question arises again, we would encourage the Board and the parties to explore it in more detail.[241]

The DPS also charges that BA's failure to offer voice messaging at a wholesale discount is a "barrier to entry," in violation of section 253 of the Act.[242] The DPS asserts that customers are reluctant to switch to an alternative provider of local service if the change will cause them to lose, or diminish the quality of, their existing voice messaging service. The DPS also claims that some CLECs cannot otherwise provide comparably feature-rich voice-messaging offerings at a comparable price without reselling BA's service. This, the DPS concludes, places CLECs at a significant disadvantage and essentially denies them competitive access to a significant segment of the user population.

We disagree. The DPS fundamentally is arguing that when an incumbent LEC offers an information service that is difficult for CLECs to duplicate at a competitive price, the LEC creates

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240 See, Docket 5713, Order of 5/29/96, at 19 (footnote 54) (standard for UNE unbundling should recognize practical economic impediments associated with accessing realistic competitive alternatives).

241 The question of resale might arise in a variety of other contexts. For example, during interconnection negotiations, Bell Atlantic and a reseller CLEC might be unable to agree on resale of voice messaging. If the CLEC sought arbitration before the Board, the Board at that time would presumably examine the practical effect of the unavailability of voice messaging for resale.

242 Section 253 provides, in part:

(a) IN GENERAL.--No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

a “barrier to entry” if the incumbent LEC does not offer that service at resale. In other words, the DPS would use section 253 as a way to augment the explicit resale obligations in sections 251 and 271 of the Act, thereby extending those obligations beyond telecommunications services to information services. Even if the factual predicates for such a conclusion were in the record, and they are not, this would not be a proper standard for section 253 of the Act. If this argument were adopted, an incumbent LEC [243] would be required to offer for resale all services that are useful to a CLEC, whether they be "telecommunications service" or not. Such a broadening of section 253 is unwarranted and would swallow whole the more specific requirement in section 251 that "telecommunications services" be offered for resale.

Special Contracts

The DPS complains that BA's refusal to make term agreements available for resale violates the act and is inconsistent with the merging companies' assurances that they would support efforts to open the state's telecommunications market to competition.[244] In particular, the DPS contends that Bell Atlantic has refused to make tariffed term agreements available for resale without imposing termination liability on the customer.

The DPS raised this issue for the first time in its brief. It did not provide any prefiled testimony on the issue, nor did the issue arise during oral testimony. The question is not ripe for decision here. Moreover, the same issue is pending before the Board in another docket.[245]

Forecasting Penalties

The DPS objects to several aspects of BA's requirement that CLECs forecast their resale demand. One aspect of the objection is to the consequences for an inaccurate forecast.

Findings

223. The SGAT requires reseller CLECs to forecast their demand for resold services. Exh. Board-C-1 (SGAT) §§ 6.3.1.1(E), 6.3.2.1, 6.3.11(e); tr. 6/17/98 at 112-13 (Raymond).

224. If a CLEC provides too low an estimate, there is a risk of a general shortage of facilities for all users on the network, including the CLEC, but also including BA. Chu reb. pf. at 12.

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[243] Actually, the argument is not necessarily limited to services offered by incumbent LECs. Section 253 applies to all LECs.

[244] DPS Brief at 32.

[245] *See*, Docket 6121, *Complaint of CTC Communications.*

225. If a CLEC provides too low an estimate, Bell Atlantic does not reduce the construction priority for that CLEC's work. Rather, construction priorities are assigned on a first-come-first-served basis. Tr. 6/18/99 at 85 (Chu).

226. The SGAT authorizes Bell Atlantic to decline to provision additional services if the CLEC fails to comply with the terms and conditions of the SGAT. Such steps are taken with notice to the CLEC and the Board, and the CLEC can gain a stay by making payment under protest. Exh. Board-C-1 § 6.3.2.1.

Conclusions

The parties disagree on the consequences of inaccurate resale forecasts by CLECs. The DPS notes that under the general remedies provision of the SGAT, Bell Atlantic could punish CLECs for inaccurate forecasts by discontinuing service. The DPS suggests, for instance, that if a CLEC provides too low an estimate, Bell Atlantic might abandon further provisioning for that CLEC or, at its discretion, discontinue provision of service to the CLEC's customer. If a CLEC provides too high an estimate, the DPS asserts that Bell Atlantic may discount the CLEC's future estimates.[246]

We believe that the DPS' view of the SGAT is not correct. While the record is not entirely clear, we interpret the SGAT to mean that there are no consequences from an inaccurate low estimate, with the exception of the possible resulting shortage of facilities for all carriers.[247]

The DPS also makes a textual argument based upon the SGAT. It correctly notes that the SGAT authorizes Bell Atlantic to take significant steps, including termination of further services, against CLECs that breach the "terms and conditions" established in the SGAT. We conclude that the DPS's reading of this language is not supported by the context. Further reading of the breach language establishes that it is intended to cover financial nonpayment by the CLEC.[248] We see nothing particularly alarming in a provision of the SGAT that allows Bell Atlantic to refuse new services to a CLEC that is not paying its bills.[249]

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[246] Tr. 6/17/98 at 60, 62, 112 (Raymond).

[247] *See*, tr. 6/18/98 at 79-81 (Chu).

[248] The SGAT also provides in the same section that Bell Atlantic will not take remedies if the CLEC provides payment under protest, subject to the results of an investigation. Exh. Board-C-1 § 6.3.2.1(C).

[249] If BA's were to claim a right to limit service based upon inaccurate good faith forecasts, we could have significant concerns.

Furthermore, there are numerous procedural protections in the SGAT that would apply to any action of the type imagined by the DPS. Any action by Bell Atlantic to terminate further CLEC services must be accompanied by notice to the CLEC and to the Board. The CLEC must receive two notices of nonpayment, and the Board will receive a copy of each. Thereafter, the Board may act affirmatively to prohibit Bell Atlantic from terminating the CLEC.[250] While there is a possibility of harm here, it appears remote, and the Board appears to have adequate tools on hand to avoid any irrevocable harm to the CLEC. No change to the SGAT is required.

Protection of Competitive Information - Resale Forecasts

The DPS also objects that resale forecast information provided to Bell Atlantic may be misused by Bell Atlantic to place the CLEC at a competitive disadvantage.[251] The DPS contends that the protections of federal law are not sufficient to protect the interests of CLECs since there are many opportunities for improper informal communication.[252] The DPS proposes that forecast information be expunged from Bell Atlantic records after it has been used. In the alternative, the DPS proposes that Bell Atlantic employees with access to the information be prohibited for a period of time from transferring to positions where their performance might be enhanced by use of this confidential forecast information.[253]

Findings

227. Most of the actions taken by Bell Atlantic for a CLEC occur after an order has been placed. In some cases, however, actions may be appropriate before an order is filed, based upon forecasted demand. Tr. 6/17/98 at 74-75 (Raymond).

228. As of September 30, 1997, Bell Atlantic had established a separate department to service CLECs' requests for interconnection and access to network elements. Electronic "fire walls" ensure that retail employees cannot see the accounts of resellers. Chu reb. pf. at 8; tr. 6/18/98 at 76 (Chu).

Conclusions

As we noted above in the context of interconnection, the relationship between CLECs and Bell Atlantic is a bilateral business relationship as well as a competitive one. Even though Bell

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[250] Exh. Board-C-1 § 6.3.2.1(B).

[251] Tr. 6/17/98 at 113-14 (Raymond).

[252] Tr. 6/17/98 at 115-16 (Raymond).

[253] Tr. 6/17/98 at 118 (Raymond).

Atlantic is in a more powerful position on many issues, the relevant legal inquiry is whether the SGAT's existing forecasting arrangements make reasonable allowance for the legitimate interests of all parties, including both the CLEC's confidentiality and BA's need to use the information.

CLECs have two principal interests. First, CLECs have an interest in protecting their business plans. As the DPS notes, if an incumbent LEC were to use a CLEC's forecast information improperly, harm to the CLEC could follow. In this sense, forecasting information can be considered proprietary information within the meaning of Section 222 of the Act.

Second, CLECs have an interest in receiving provisioning from Bell Atlantic that responds flexibly to unforeseen market developments.[254] From time to time, CLECs will experience growth beyond their expectations. When a CLEC has made a good faith forecast, it should thereafter be able to make reasonable modifications to that forecast and to receive added provisioning from BA.

Bell Atlantic has relevant interests as well. Bell Atlantic has a legitimate interest in knowing how much demand a CLEC will impose on its systems and facilities.[255] This helps Bell Atlantic to manage its capital investments, its existing facilities and its outside plant personnel. A CLEC that abuses the forecasting process could force Bell Atlantic into making pointless deployments of capital. This in turn would decrease BA's ability to provide for all of the customers receiving services from its network, including CLEC customers.

In light of the identified interests of both parties, we conclude that it is reasonable to impose a forecasting requirement on resale volumes. At the same time, the forecast information should be protected, to the extent feasible, from Bell Atlantic employees connected to its retail activities. In particular, forecast information cannot be allowed to reach BA's marketing employees. Thus the relevant inquiry is not whether there should be forecasts, but whether sufficient protection is afforded to CLEC information provided in forecasts.

Under section 222 of the Act, information gained by Bell Atlantic following an interconnection request cannot be used for any purpose other than that for which it was provided.[256] Bell Atlantic has made significant organizational changes to comply with this

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[254] The DPS suggested an expedited work order process available to CLECs when actual demand significantly exceeds forecasted demand. Tr. 6/17/98 at 70 (Raymond).

[255] Tr. 6/17/98 at 184 (DeVito).

[256] 47 C.F.R. § 222(b); *see also* Chu reb. pf. at 5.

requirement, such as by creating an "electronic fire wall" between its retail and wholesale employees.

However, the DPS has not shown that, after these organizational changes, confidential information has been or is likely to be used improperly.[257] We conclude that Bell Atlantic has made reasonable organizational accommodations to insulate CLECs from the competitive disadvantage arising from improper commercial use of CLEC collocation plans. Based upon the present record, improper use of that information is speculative. The Department's proposed restrictions on transfer of employees appear excessive, absent a showing that competitively sensitive and protected information is actually being used or that Bell Atlantic is shifting employees between business lines as a means of evading that Act's proscriptions.

Upselling

The DPS asserts that Bell Atlantic permits its field personnel to seek to recover customers who have subscribed to a CLEC's services.

Findings

229. Bell Atlantic field personnel have direct customer contact. When retail service is resold, it occasionally requires Bell Atlantic employees to perform work at the customer's location, even though Bell Atlantic has no direct relationship with the customer. Chu pf. at 79.

230. Bell Atlantic rewards field personnel for success in getting customers to return to Bell Atlantic. Tr. 6/17/98 at 84-86 (Raymond).

231. Bell Atlantic technicians are only permitted to "upsell" Bell Atlantic services when they are on a site visit at a Bell Atlantic customer's location. When field personnel are at a site of a reseller's customer, BA's technicians are not permitted to solicit CLEC customers. If the customer desires changes to the service, the customer is instructed to contact the reseller directly. Resold lines are not disconnected, suspended or terminated unless the reseller so directs. Bell Atlantic technicians are informed when visiting a customer whether they are visiting a Bell Atlantic customer or a CLEC customer. Bell Atlantic technicians are trained in these limitations. Tr. 6/17/98 at 84-86 (Raymond); tr. 6/18/98 at 76-79 (Chu).

Conclusions

The DPS argues that under Section 6.3.1.3 (B)(4) of the SGAT, installation and repair personnel handling a resale order are permitted to attempt to win back former Bell Atlantic

[257] Tr. 6/17/98 at 26 (Raymond)

customers. Since the DPS contends each order will be marked as a reseller order, the DPS asserts that Bell Atlantic has constructed an alternative sales channel that can undermine the CLEC's efforts to develop strong customer relations.

However, BA's uncontradicted testimony establishes that Bell Atlantic technicians are prohibited from offering Bell Atlantic services to customers of other carriers and are trained to adhere to this prohibition. We agree that this policy is necessary and appropriate; the Department is correct that such "win-back" efforts would be anti-competitive and violate Board principles. However, lacking evidence that this Bell Atlantic policy is ineffective, no relief is appropriate on this point.

Installation Interval

The DPS objects that Section 6 of the SGAT contains provisions that prohibit CLECs from ensuring timely performance to their customers. In particular, the DPS criticizes BA's policy of negotiating installation intervals for orders of ten or more resold lines on an individual case basis ("ICB").

Findings

232. Under Section 6 of the SGAT, installation intervals for orders of ten or more resold lines are negotiated on an individual case basis. Raymond pf. at 10.

233. In December, 1997, BA's average installation time for its own customers who requested ten or more lines was 10 days. Exh. BA-C-3.

Conclusions

Bell Atlantic declines to prescribe in advance the installation interval when a CLEC converts and resells 10 or more lines. Rather, the installation interval must be negotiated.

We discussed above the similar practice of requiring individually negotiated installation intervals for UNEs. There, we concluded that the ten-line rule for individual negotiation has a reasonable basis. Here, similar considerations apply.

The fundamental question is whether a large resale order can be expected to be frequently anomalous and therefore inappropriate for a fixed installation schedule. While the DPS offered testimony that ICB installations could be bothersome to CLECs, it did not offer any evidence that, given the circumstances, ICB scheduling was unreasonable. Indeed, Bell Atlantic asserts (and the DPS does not contest) that unusual circumstances often arise for installations of more than ten

lines. Moreover, there is no evidence that BA's actual installation performance has discriminated against competitors.

We recognize that CLECs cannot be discriminated against by Bell Atlantic in installations. Rather than require a stated installation interval, however, we prefer to rely upon the nondiscrimination rule, supplemented by the historic installation data that is reported by BA.[258] The record does not provide a sufficient basis to conclude that BA's existing practice is unreasonably discriminatory.

Conclusions - Resale

We conclude that Bell Atlantic has complied with Competitive Checklist item fourteen. However, we recommend that the Board require Bell Atlantic to amend its SGAT so as to permit resale of toll service at an appropriate discount.

Conclusions

Except as noted below, Bell Atlantic has demonstrated that as of September 30, 1997, it was capable of providing each of the items listed in the Competitive Checklist in section 271 of the Act.[259]

(1) Bell Atlantic has met its burden of demonstrating compliance, as of September 30, 1997, with Competitive Checklist item I. We recommend that Bell Atlantic be required to prepare a list showing the approximate square footage in each central office that is unoccupied and that could support physical collocation by CLECs. Bell Atlantic should make this list available to CLECs upon request. We also recommend that Bell Atlantic be required to amend the SGAT so that a CLEC's full deposit is returned to a requesting CLEC if physical collocation space is not available.

(2A) Bell Atlantic has met its burden of demonstrating compliance, as of September 30, 1997, with Competitive Checklist item II. However, Bell Atlantic should amend its SGAT to allow CLECs to purchase combined UNEs in any manner that is consistent with the FCC's reinstated rules.

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[258] *See*, discussion of performance monitoring above.

[259] The conclusions here exclude pricing issues, which are under consideration in Docket 5713.

(2B) BA's OSS meets the requirements of the Competitive Checklist. However, Bell Atlantic should, within 60 days, demonstrate in a compliance filing that Bell Atlantic has met its stated goal of a four-second response time as to all types of CLEC preordering inquiries including due date availability, address validation, and product and service availability.

(2C) BA's performance measurement system is reasonable.

(3) Bell Atlantic has met its burden of demonstrating compliance, as of September 30, 1997, with Competitive Checklist item III. However, Bell Atlantic should be required to delete from its pole attachment tariff the right to charge a 10 percent markup on pole attachment work. Bell Atlantic should also be required to make reference in its SGAT to the currently applicable tariff for pole attachment.

(4) - (13) Based upon the uncontested evidence, Bell Atlantic has complied with Competitive Checklist items four through thirteen.

(14) Bell Atlantic has complied with Competitive Checklist item fourteen, on condition that it amend the SGAT to permit resale of toll service at an appropriate discount.

These conclusions are limited to this docket, and do not bind other parties in Docket 5936. No findings here may be used for any purpose in any subsequent review under 47 U.S.C. § 271.[260]

As stated in the Third and Fourth Procedural Orders in Docket 5936, the Board is interpreting Vermont law to the extent it is interpreting BA's compliance with a merger condition imposed by the Board. The Board therefore has latitude to evaluate whether the combined NYNEX-Bell Atlantic entity has satisfied the Board's overall goal of not interfering with the development of competition in the state and to do so using criteria that the Board deems appropriate.

Upon completion of the above actions, condition 4 in the Merger Order is satisfied, and Docket 5900 should be closed.

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[260] This limitation is consistent with our earlier Order of June 4, 1998, granting transfer of merger compliance issue back to this docket.

The foregoing is hereby reported to the Public Service Board in accordance with the provisions of 30 V.S.A. § 8. This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

DATED at Montpelier, Vermont, this 4th day of June, 1999.

s/ Peter M. Bluhm
Peter M. Bluhm, Esq., Hearing Officer

s/ George E. Young
George Young, Esq., Hearing Officer

Board Discussion

We agree with the findings and conclusions of the Hearing Officers, except in four areas described below.

This is the first time that the Vermont Public Service Board has reviewed the performance of Bell Atlantic under any portion of the federal statute that governs Bell operating company entry into interLATA services (47 U.S.C. § 271 or "Section 271"). The findings indicate that Bell Atlantic has made significant progress toward meeting the requirements of the competitive checklist. The Hearing Officers' recommendations reflect this progress.

We want to reinforce the observation that these proceedings are of limited applicability. This decision is solely about whether New England Telephone and Telegraph Company d/b/a Bell Atlantic-Vermont ("Bell Atlantic") has complied with a merger condition in this docket. The federal "competitive checklist," a portion of Section 271, is only relevant here because it was incorporated into that merger condition. Our decision here, and the facts and conclusions underlying it, have no applicability to a subsequent proceeding, in Docket 5936 or otherwise, under Section 271.

This restriction is particularly appropriate given the narrow scope of parties who participated here. The sole parties were Bell Atlantic, the company affected, and the Vermont Department of Public Service ("DPS"). While the proposed decision covers a wide range of issues, the contested issues were a relatively narrow subset of those possible under Section 271.[261] When the Section 271 proceeding is ultimately undertaken in Vermont, we fully expect that comprehensive testimony from a variety of parties will be offered.

Survey of Physical Collocation Space

The Hearing Officers recommended that Bell Atlantic be required to prepare a list showing the approximate square footage in each central office that is unoccupied and that could support physical collocation by competitive local exchange carriers ("CLECs"). In comments filed on the proposal, the DPS supported the recommendation, but Bell Atlantic opposed it. Bell Atlantic noted that the FCC has adopted new standards for collocation.

Those new FCC standards require, for example, that Bell Atlantic make shared collocation cages and cageless collocation arrangements available to requesting carriers. Bell Atlantic must

[261] Voluminous prefiled testimony was offered by interexchange carriers in Docket 5936 and was later withdrawn when the compliance question was transferred from Docket 5936 to this docket.

also refrain from imposing unreasonable segregation requirements that create unnecessary additional costs for competitors, and in particular may not require a CLEC to purchase more space than the CLEC needs.[262] Moreover, we note with approval the FCC's decision that when interconnection is requested, the incumbent normally must respond within ten days.[263]

The Hearing Officers' recommendation was intended to provide early information on the possible exhaustion of collocation space. For some time, the FCC has required that, when collocation is denied, the incumbent must provide the state commission with detailed floor plans.[264] Of relevance to that concern, the FCC now requires that where space is limited, collocation must be supported in adjacent structures.[265] Significantly, the new FCC order also imposed a new requirement that an incumbent LEC that denies a CLEC request for physical collocation due to space limitations should also allow the CLEC to tour the entire premises in question, without charge, within ten days.[266]

In light of the FCC's new order, we conclude that it is not necessary or desirable that Bell Atlantic perform a survey and list the approximate square footage in each central office that is unoccupied. The FCC post-denial requirements should be sufficient to ensure that competitors' interests are protected. In reaching this conclusion, we also rely upon the fact that no carriers have filed complaints with Bell Atlantic concerning denial of collocation.

Deposits

The Hearing Officers recommended that Bell Atlantic be required to return 100 percent of any deposit for physical interconnection if physical collocation will be denied. Currently only 75 percent of the deposit is returned, and the remaining 25 percent is retained by Bell Atlantic. The Hearing Officers' rationale was that retaining a portion of the deposit is commercially extraordinary, and that few, if any, competitive enterprises charge customers whose needs they cannot meet.

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[262] *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-48, ¶¶ 41-43 (March 31, 1999) ("*1999 Collocation Order*").

[263] The FCC has urged the states to ensure that collocation space is available in a timely and pro-competitive manner that gives new entrants a full and fair opportunity to compete. *1999 Collocation Order* at ¶ 55.

[264] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15805, at para. 602 (1996).

[265] *1999 Collocation Order* at ¶ 44.

[266] *1999 Collocation Order* at ¶ 57.

We disagree, and note several cases where the providers of service and goods do charge customers for their preliminary costs even though they ultimately do not provide the service desired. These include services provided by a variety of professions. The custom varies depending upon the overall circumstances.

In construction contracting, by contrast, when a customer seeks bids it is customary that the losing bidder receives no reimbursement of expenses. In these cases, the losing contractor presumably recovers the cost of unsuccessful bids with the profits from successful bids. This analogy does not hold under present circumstances, however, as Bell Atlantic should have no opportunity to recover development costs from other activities. Bell Atlantic's earnings are regulated, and foregone earnings from one service can easily translate into increased rates for another service.

Also, Bell Atlantic is not seeking the work. While it may be imagined that at some time in the future Bell Atlantic would actively seek collocation with CLECs, that is not yet the commercial reality. To the extent that Bell Atlantic is responding to CLEC requests, it is more reasonable that it be permitted to recover its costs. Accordingly, we conclude that Bell Atlantic may recover its costs when a collocation request is denied.

We are less comfortable with the practice of keeping 25 percent of the deposit in all cases. It may serve a role in preventing cost inflation, but use of a liquidated cost estimate is somewhat unusual, and may not be in keeping with actual costs. Bell Atlantic has a significant amount of internal information that may allow it in some cases to determine with only superficial investigation that a collocation request is impracticable. A fixed 25 percent charge can be unfair to competitors where, as here, most problems are evident early in the investigation and before substantial costs have been incurred.

On balance, we consider it commercially reasonable that Bell Atlantic be allowed to retain, from the deposit, its actual expenses for site investigation at the requested site. We direct Bell Atlantic to file an amendment to its SGAT that provides for retention of the lesser of 25% of the deposit or of the costs actually incurred in conducting the requested investigation for collocation.

Network Elements

The Hearing Officers recommended that Bell Atlantic amend its SGAT to allow CLECs to purchase combined UNEs in any manner that is "consistent with the FCC's reinstated rules." Specifically, the Hearing Officers were concerned about the fact that Bell Atlantic's current tariffs

do not provide for CLECs to purchase combinations of network elements, even though the FCC rule mandating such sales has been reinstated.

The parties disagree about whether two relevant portions of an FCC rule are in effect. The first provision, subsection (b), prohibits an incumbent LEC from "separat[ing] requested network elements that the incumbent LEC currently combines."[267] All parties agree that this portion of the FCC rule was recently reinstated by decision of the United States Supreme Court.[268]

The second relevant provision in the FCC rule, subsection (c), obligates Bell Atlantic to:

> perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in [Bell Atlantic's] network, provided that such combination is:
>
> (1) Technically feasible; and
>
> (2) Would not impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with [Bell Atlantic's] network.[269]

The parties disagree about whether this subsection is now in effect. The DPS argues that it is in effect.[270] Bell Atlantic, however, notes correctly that this subsection was vacated in an earlier decision by the Eighth Circuit of the United States Court of Appeals. Bell Atlantic further argues that the Court of Appeals decision on subsection (c) was never appealed, that it could therefore never have been reversed, and that the Court of Appeals' *vacatur* stands.[271]

In order to advance our discussion of this concept, we believe it is helpful to define two different sets of unbundled network elements. The first category are the sets of unseparated UNEs mandated by subsection (b) of the rule, hereafter referred to as "UNE-Us."[272] The second category are the combinations of separated UNEs that a carrier must assemble on request, hereafter referred to as "UNE-Cs." It is the UNE-C that has not been reinstated by the Supreme Court.

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[267] 47 C.F.R. § 51.315 (b). This provision does not permit an ILEC to refuse to offer an identified UNE by itself, when requested.

[268] *AT&T Corp., et al. v. Iowa Utilities Board, et al.,* 119 S.Ct. 721 (1/25/99) ("AT&T v. Iowa").

[269] 47 C.F.R. § 51.315 (c).

[270] DPS comments on Proposed Decision at 5. AT&T Communications of New England, Inc., which is a party in this docket but did not participate in hearings in this compliance phase, filed a letter expressing a similar view.

[271] Bell Atlantic comments on Proposed Decision at 4.

[272] When those UNEs necessary to provide local exchange service are made available on an unseparated basis, it is commonly referred to as "UNE-Platform" or "UNE-P". We avoid that term here, however, because it has been used in other contexts and may not carry our intended narrow meaning to all readers.

For two reasons, we agree with the Hearing Officers that Bell Atlantic should file amendments to its SGAT relating to UNEs. First, under subsection (b) of the FCC rules, which all parties agree is binding federal law, Bell Atlantic is prohibited from separating network elements that currently are combined in its own network. Bell Atlantic's SGAT does not offer UNE-Us, and so the SGAT needs to be amended promptly.

A complication arises from the fact that, following remand from the Supreme Court, the FCC has not yet reissued a definitive list, for federal purposes, of the required unbundled network elements.[273] However, while some elements in the original FCC list may be in doubt, there seems little real doubt about most of the items.[274] For example, it seems highly likely that the list will include at least those elements listed in Section 271, the section under which Bell Atlantic may soon be seeking authority to offer interLATA toll service. Thus it seems likely that the final FCC list will include at least the loop, switching and local transport.[275]

Lacking a definitive federal list of UNEs, we rely instead upon Docket 5713 which established an equivalent list for purposes of state law. As we held in that docket, the minimum list of elements that must be provided by Bell Atlantic included the link,[276] end-office switching, inter-office transport, tandem switching, signaling and ancillary services.[277] We note that this list is quite similar to the elements presently offered individually in Bell Atlantic's SGAT. Bell

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[273] The FCC issues a notice of proposed rulemaking on this point, and the comment period has expired. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 and 95-185, Second Further Notice of Proposed Rulemaking, FCC 99-70 (April 16, 1999).

[274] 47 30 U.S.C. § 251 (c)(3). The Act also requires that UNEs identified by the FCC must be either of a proprietary nature and "necessary," or that the failure to provide access to the UNE would impair the ability of the CLEC to provide the services that it seeks to offer. 47 30 U.S.C. § 251 (d)(2).

[275] The list of elements contained in Section 271 includes:

> * * * *
> (iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.
> (v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.
> (vi) Local switching unbundled from transport, local loop transmission, or other services.
> (vii) Nondiscriminatory access to--
> (I) 911 and E911 services;
> (II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and
> (III) operator call completion services.
> * * * *
> (x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

[276] This UNE seems similar to or identical to the Act's reference to "local loop transmission."

[277] Docket 5713, Order of 5/29/96 at 19.

Atlantic should ensure that, to the extent these facilities are now combined to serve an individual customer, these Docket 5713 UNEs are available in unseparated form. When the FCC issues a definitive rule on the definitions of UNEs, the list in the SGAT may be revisited, but we anticipate that the needed revisions will be minor.

Offering unseparated UNEs should be a relatively simple matter and should not require any exotic new combinations. The essential point is that where a set of existing individual network elements already serve a single customer, that same set must be offered to CLECs in a way that permits them to be purchased in groups. Bell Atlantic is not required to physically connect anything that it has not already connected to serve the same customer. Rather, Bell Atlantic must refrain from disconnecting UNEs that it would ordinarily provide in a continuous manner for its own customer.

Stated more generally, in offering UNE-U, Bell Atlantic must refrain from imposing any additional requirement on the CLEC that it does not impose on itself. So, for example, Bell Atlantic does not, for its own customers, physically separate loop from switch and then require the CLEC to recombine them at an interconnection cage. Therefore it may not do so for CLECs. Similarly, Bell Atlantic cannot impose an additional charge simply because a CLEC elects to purchase more than one UNE per end user.

As we noted above, the parties disagree about the vitality of subsection (c) of the FCC rule following the Supreme Court decision in *AT&T v. Iowa*. After reading the Court's opinion, it appears to be a close question whether the rationale for reviving subsection (b), under *stare decisis*, would be broad enough also to revive subsection (c) as well. Given our ruling above concerning UNE-U, it is less necessary to address this UNE-C issue, and we decline for the present to decide this question of federal law. It may be that UNE-Us will be all that Vermont CLECs request in the near future. If further steps are required, we are content to take those steps in a context other than enforcing conditions imposed in the NYNEX-Bell Atlantic merger.

As an adequate and independent ground for our decision, we also conclude that under state law Bell Atlantic should file amendments to its SGAT offering UNE-U. Effective competition among local exchange providers has been the Board's announced policy for at least the last three years since the Phase I order was issued in Docket 5713. It would frustrate that policy to permit UNEs that are now combined to be separated physically in order to make them more difficult or more expensive for CLECs to acquire and use.[278] It is none too soon for Bell

[278] *See also*, Docket 5713, Order of 5/13/99 (directing Bell Atlantic to file by May 28, 1999 a "description of the terms, conditions, and prices upon which it will make combined network elements available to competitors.")

Atlantic to begin offering UNEs in a way that accommodates the needs of competing carriers for sets of elements from its network.

Neither this Board nor the Hearing Officers have conducted any evidentiary hearings as to which UNE-U offerings should be available to CLECs. However, this does not derogate from Bell Atlantic's obligation to have in its SGAT, today, offerings that comply with state and federal law. While we cannot issue a conclusive determination on which unseparated UNEs must be offered under federal law, we are quite confident in our conclusion that Bell Atlantic, by offering no such combinations, is violating the competitive checklist and thus a condition of compliance in this docket.

Moreover, filing an amendment to the SGAT to provide UNE-U should not be an unreasonable burden. It is true that there are different kinds of links, different kinds of switching, different kinds of inter-office transport, and different kinds of ancillary services. In addition, there are variations in tandem switching, and signaling as well. Yet there is no need to list every possible combination. It is not necessary for Bell Atlantic to develop even one new "product." Rather, the SGAT need only state that CLECs may purchase more than one UNE for a single end user without also facing a requirement to pay additional charges or a requirement that it physically rejoin UNEs that normally are not severed.

Bell Atlantic may also want to list several combinations that it anticipates will be useful to CLECs.[279] With the intention of giving some guidance to Bell Atlantic, and thereby avoiding or narrowing future litigation, we offer here a list of combined UNEs with the expectation that Bell Atlantic should make these combinations available (whether or not explicitly listed in the SGAT) or it should offer a very good reason otherwise. The list includes:

1. link and end-office switching, terminating in a collocation cage or interconnection meet point, with and without signaling;
2. link, end-office switching and inter-office transport, terminating at an interconnection point designated by the wholesale customer, with and without signaling;
3. link, end-office switching, inter-office transport and tandem switching, terminating at an interconnection point designated by the wholesale customer, with and without signaling;

[279] Indeed, Bell Atlantic may want to consult with its wholesale customers before reaching a conclusion as to which combinations to offer explicitly.

4. any of the above, combined with ancillary services such as call completion, call assistance, directory assistance, and access to E-911 services.

After Bell Atlantic files its tariff amendments offering UNE-Us, the DPS may object to the filing. In that event, Vermont statutes provide a mechanism for investigating the tariff. For present purposes, we note only that we expect Bell Atlantic to make a good faith effort to amend its SGAT to offer CLECs a meaningful opportunity to acquire sets of UNEs that have not been artificially separated in a way that imposes additional costs upon the CLECs.

Voice Messaging

The Hearing Officers did not recommend that Bell Atlantic be required to resell voice messaging. Their conclusion was based upon the ground that, under federal law, voice messaging is not a telecommunications service and also upon the ground that the record was insufficient to justify use of state authority. We disagree on both points.

As the Hearing Officers noted, the FCC has ruled that voice messaging need not be resold, and its reasoning was that telecommunications services and information services, including voice messaging, are "separate, non-overlapping categories." They noted that voice messaging appears to meet the statutory definition of a "telecommunications service," but for the separate doctrine that information services cannot be telecommunications services.

This distinction between information services and telecommunications services has been undercut, however, by two recent FCC decisions involving the Internet. In one case, the FCC decided that dial-up Internet calls ("ISP-bound traffic") are single telecommunications transactions from "end to end," including the portion of the call that travels in Internet protocol over a packet switched network.[280] The FCC also decided that a substantial portion of that Internet traffic "involves accessing interstate or foreign websites," and is therefore interstate in character.[281] This jurisdictional ruling was reached without any discussion of whether "accessing websites" is an information service or a telecommunications service. We conclude that the FCC's assertion of jurisdiction over ISP-bound traffic is inconsistent with and implicitly reverses its prior rulings that an information service cannot be a telecommunications service.

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[280] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 99-68, Declaratory Ruling and Notice of Proposed Rulemaking, Feb. 26, 1999, FCC 99-38 ¶ 18.

[281] *Id.* The FCC did not in that order decide whether interstate Internet traffic is separable from intrastate Internet traffic. *Id.* at ¶ 19.

In a different decision, the FCC recently permitted the filing of ADSL tariffs as interstate services.[282] ADSL is a digital "always-on" service that provides customers with a high speed entry point into the telecommunications network. In a sense, ADSL functions as a high capacity local loop. The FCC again used the "one-call" theory. It noted that under the particular tariff under review, all communications over the ADSL circuit would terminate, not at the ISP's local server, but at the ultimate destination or destinations, very often at a distant Internet website accessed by the end user.[283] Once again, by concluding that a communication with an Internet website is interstate telecommunications, it has implicitly reversed the rule that Internet transactions are information services and therefore not a telecommunications service.

In summary, we agree with the Hearing Officers that voice messaging meets the definition of telecommunications service. Based upon our analysis of the above FCC decisions, we conclude that the fact that voice messaging is also an information service is not material to its status as a telecommunications service. Accordingly, we direct Bell Atlantic to file tariffs offering voice messaging for resale. We base this direction upon our interpretation of the federal Telecommunications Act of 1996.

We also conclude that, as a matter of state law, Bell Atlantic should offer voice messaging for resale. This conclusion is separate and independent of our interpretation of federal law.

30 V.S.A. § 203(5) states that the Board has jurisdiction over a "person or company offering telecommunications service to the public on a common carrier basis." "Telecommunications service" is defined as "the transmission of any interactive two-way electromagnetic communications, including voice, image, data and information."[284]

Voice messaging is an interactive two-way electromagnetic communications. Therefore, we conclude that voice messaging is a telecommunications service under Vermont law. The Board has authority to issue orders to any carrier providing voice messaging concerning the manner of operating and conducting its business, "so as to be reasonable and expedient, and to promote the safety, convenience and accommodation of the public."[285] It also has authority to

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[282] *In re GTE Telephone Operating Company Tariffs*, CC Docket No. 98-79, Memorandum Opinion and Order, 10/30/98, FCC 98-292 at ¶ 16.

[283] *Id.* at ¶ 19.

[284] The statute also provides that telecommunications services may be transmitted through the use of any media such as wires, cables, television cables, microwaves, radio waves, light waves or any combination of those or similar media. There are some exceptions, not material here, including "value added nonvoice services in which computer processing applications are used to act on the form, content, code and protocol of the information to be transmitted unless those services are provided under tariff approved by the public service board."

[285] 30 V.S.A. § 209(3).

regulate the quantity and quality of any product[286] and to restrain a telecommunications company from any unjust discriminations.[287]

The record also shows that demand is growing for this service,[288] despite the fact that similar services can be derived from customer-owned equipment. The Hearing Officer noted that the record was sparse as to the factual basis for such an assertion of state law. However, we do not believe that a detailed factual record is necessary to resolve this question, which is mainly a matter of law and policy. The record does show that voice messaging is a service valued by customers, and we have no reason to suppose that CLEC customers value it any less than the customers of incumbent carriers. Directing that Bell Atlantic make the service available for resale increases the ability of the retail customers of CLECs to receive the service, and thereby promotes the convenience and accommodation of the public.

In summary, based upon our reading of the Telecommunications Act of 1996, as well as our authority under Title 30 of Vermont law, we direct that Bell Atlantic file tariffs allowing for resale of voice messaging. We note that this decision is consistent with the decisions of several other states cited by the Hearing Officers.

Order

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. Except as noted above, the findings and conclusions of the Hearing Officers are adopted.

2. Within 30 days, Bell Atlantic shall make the following changes to its Statement of Generally Available Terms to:

   a. Allow CLECs to purchase unseparated UNEs in a manner consistent with the FCC's reinstated rules and the preceding discussion;
   b. Delete the provisions authorizing a 10 percent markup on pole attachment work;
   c. Make reference to the appropriate pole attachment tariff;
   d. Permit resale of toll service at an appropriate discount;
   e. Permit resale of voice messaging service at an appropriate discount.

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[286] 30 V.S.A. § 209(1).

[287] 30 V.S.A. § 209(a)(6).

[288] *See*, findings accompanying Hearing Officers' discussion of voice messaging.

3. This docket shall remain open for possible review of Bell Atlantic's SGAT filings. If the SGAT is amended as required above and no objection is made within 30 days, this docket shall be closed.

DATED at Montpelier, Vermont, this 29th day of June, 1999.

s/ Michael H. Dworkin	)	
	)	PUBLIC SERVICE
	)	
s/ Suzanne D. Rude	)	BOARD
	)	
	)	OF VERMONT
s/ David C. Coen	)	

OFFICE OF THE CLERK

Filed: June 29, 1999

Attest: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board of any technical errors, in order that any necessary corrections may be made.

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.

ATTACHMENT 2

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 5900

Joint Petition of New England Telephone	)
& Telegraph Company d/b/a NYNEX, NYNEX	)
Corporation, and Bell Atlantic Corporation	)
for approval of a merger of a wholly-owned	)
subsidiary of Bell Atlantic Corporation	)
into NYNEX Corporation (In Re: Compliance	)
Phase)	)

Order entered: 1/31/2000

Order on Motion for Reconsideration

Summary

Today's Order affirms and clarifies our earlier decision regarding unseparated network elements and voice messaging. As to network elements, we adopt the Federal Communications Commission's ("FCC's") recently published list of elements, and we require, under state and federal law, that New England Telephone & Telegraph Company d/b/a Bell Atlantic-Vermont ("BAVT" or "Bell Atlantic") offer combinations of elements that will be most useful to competitive local exchange carriers. As to voice messaging, we reaffirm, based upon state law only, our earlier decision that BAVT must offer voice messaging for resale to competitive carriers. We also eliminate a requirement previously imposed that BAVT demonstrate that it has met its stated goal of a four-second response time as to all types of Competitive Local Exchange Carrier ("CLEC") preorder inquiries handled by BAVT's operations support system.

Procedural Background

The Board issued its final order in this docket on June 29, 1999 ("Final Order"). On July 14, 1999, BAVT filed a motion for "reconsideration and/or clarification." The motion requested reconsideration of the requirements that BAVT make available sets of unseparated unbundled network elements ("UNEs") and also the requirement that BAVT must make voice mail available for resale at a wholesale discount. Oral argument on the motion was held on September 22, 1999. Comments on the motion were received from the Vermont Department of Public Service ("DPS") and the Telecommunications Resellers Association.

Unseparated Network Elements

In the Final 5900 Order, we directed BAVT to make changes to its Statement of Generally Available Terms ("SGAT") so that CLECs may purchase unseparated UNEs in a manner consistent with the FCC's reinstated rules and a detailed discussion in the Order. That discussion was based upon an FCC Rule that prohibits an incumbent local exchange carrier ("ILEC") from "separat[ing] requested network elements that the incumbent LEC currently combines."[1] We termed such combinations "UNE-Us" to reflect that they are *unseparated*, as distinguished from UNEs that must be combined for the first time. We based our decision upon two independent grounds: section 251 of the Telecommunications Act of 1996 (1996 Act)[2] and state law.

As a result of BAVT's motion and of oral argument, we clarify our original ruling in three ways. First, we identify the proper UNE elements to be offered on an unseparated basis. Second, we define more clearly the scope of the UNE-U concept, that is, the extent to which BAVT must offer UNEs that are "currently combined." Finally, we clarify the legal authority for our conclusions.

Identifying Individual Unbundled Elements

BAVT's motion for reconsideration observed that the FCC had not defined which network elements must be made available on an unbundled basis. BAVT expected the FCC order to be factually complex, and it advised this Board against assuming the outcome of that FCC determination.

The DPS argued that the Board has defined in Docket 5713 the network elements that are essential facilities, and that federal law preserves state authority in this area, so long as the state action does not go beneath the federal "floor." The DPS also noted that a letter from Bell AtlanticAVT to the FCC on February 8, 1999, offers an alternative basis that supports the conclusion in the Final 5900 Order.[3]

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1. 47 C.F.R. § 51.315 (b). This provision does not permit an ILEC to refuse to offer an identified UNE by itself, when requested.

2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. (1996 Act).

3. This letter served as the basis of a decision on a similar issue by the Massachusetts Department of Telecommunications and Energy. DPS memo at 2-3.

At the time we issued the Final 5900 Order, we were aware that the FCC was reconsidering, following a remand from the United States Supreme Court,[4] which UNEs must be made available to CLECs under 47 U.S.C. § 251. We relied instead upon the list of UNEs established in Docket 5713, which had already been established for purposes of state law.[5] After BAVT's motion was filed, however, the FCC has resolved the question. On November 5, 1999, the FCC issued an order defining UNEs required under federal law.[6] That order moots BAVT's argument on the point, but it also affords us an opportunity to be more precise in our expectations concerning BAVT's compliance.

The new FCC order reaffirmed that incumbents must provide unbundled access to six network elements. BAVT must provide some of these by February, 2000, and it must provide others by July, 2000.[7] In addition, in a subsequent order the FCC established the high frequency portion of the loop as a separate unbundled element, and mandated LEC compliance by early June, 2000.[8] These six elements and the high frequency portion of the loop are presented in the table below, adjacent to their closest equivalent element as identified in Docket 5713.

4. *AT&T Corp., et al. v. Iowa Utilities Board, et al.*, 119 S.Ct. 721 (1/25/99).

5. Docket 5713, Order of 5/29/96 at 19. We also anticipated that once the FCC issued a definitive rule on its list of UNEs, the SGAT might be further revised, but we expected that any needed revisions would be minor. Final 5900 Order at 99.

6. *Implementation of Local Competition Provisions*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, released Nov. 5, 1999 ("Local Competition Third Report and Order").

7. ILECs must provide most UNEs within 30 days of the date the Local Competition Third Report and Order is published by the Federal Register. Publication occurred in early January, 2000, and therefore these elements must be available in February, 2000. Some other elements, including dark fiber, subloops and inside wire, packet switching, databases, and loop qualification information must be available in July, 2000. Local Competition Third Report and Order, ¶ 526.

8. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Third Report and Order, ("Line Sharing Order") FCC 99-355, released December 9, 1999, at ¶ 130.

Docket 5713	**FCC Order**
the link	loops, including high-capacity lines, xDSL-capable loops, dark fiber in distribution facilities, as well as attached electronics -- other than Digital Subscriber Line Access Multiplexers ("DSLAMS") -- and inside wire owned by BAVT[9]
(not listed)	subloops (i.e., portions of the loop that can be accessed at terminals in BAVT's outside plant)
(included in the link)	network interface devices
(not listed)	the high frequency portion of the loop, but only to carriers seeking to provide xDSL-based services[10]
end office switching, tandem switching, call completion ("ancillary service"), and access to E-911 service ("ancillary service")	local circuit switching including all of the features, functions and capabilities of the switch (but excepting some customers in major urban markets)
(not listed)	packet switching[11] in the limited circumstance where BAVT has placed digital loop carrier systems in the feeder section of the loop or has its Digital Subscriber Line Access Multiplexer in a remote terminal
inter-office transport	interoffice transmission facilities ("transport") including dedicated and shared transport, and including "dark fiber"
signaling	signaling (including signaling links and signaling transfer points) in conjunction with switching, and access to call-related databases
call assistance and directory assistance ("ancillary service")	*(not listed)*
operations support system ("ancillary service")	operations support system, including existing

9. Local Competition Third Report and Order at ¶¶ 165 *et.seq*.

10. This requirement will take effect 180 days from issuance of the FCC's Order on December 9, 1999. Line sharing Order at ¶ 130.

11. Packet switching is defined as the function of routing individual data message units based on address or other routing information contained in the data units, including the necessary electronics (*e.g.*, DSLAMs).

The two lists are similar, although there are significant differences. The FCC has included subloop unbundling, dark fiber and packet switching, matters not originally included within the list produced in Docket 5713. The FCC has also deleted from the list, however, access to operator and directory assistance services.

Having considered both lists, we conclude for several reasons that we should adopt the FCC's list of elements. The FCC list is generally more detailed than the 5713 list. Also, by including dark fiber and subloop unbundling, it is more comprehensive and thus may give at least some additional boost to competition. More important, the federal list operates as a floor for state decisions. Even if, as a matter of state law, we decided to omit one of the elements identified by the FCC, BAVT would still be required to provide these elements by virtue of the FCC decision.[12]

The FCC's list does not include call assistance and directory assistance ("OS/DA"). The FCC found that there exists a significant wholesale market for these services. Although the FCC noted some differences between LEC-provided and other OS/DA services, it also concluded that, so long as the incumbent LEC provides customized routing, such differences were not so great that the absence of OS/DA as a UNE would materially diminish a CLEC's ability to offer the services it seeks to provide.[13]

The OS/DA market may have matured since this Board first mandated OS/DA as an element in Docket 5713. Nevertheless, we have no evidence in this docket that OS/DA should be removed from the Vermont UNE list. The FCC's recent findings are intriguing, but not in themselves a basis for amending an order issued in Docket 5713. We note that OS/DA is currently offered by BAVT in its SGAT. If BAVT should file an SGAT amendment withdrawing OS/DA service, we can consider at that time whether the requirements of Docket 5713 should be amended to delete this element.

In conclusion, when BAVT files its revised SGAT, we direct that those amendments include UNEs defined in the FCC's remand order as well as OS/DA. In accord with the schedule

12. Once a UNE has been identified by the FCC, states do not have authority to delete it. Local Competition Third Report and Order at ¶ 157.

13. Local Competition Third Report and Order at ¶ 441.

established by the FCC, the effective date of offering some of those elements, such as line sharing, dark fiber, and subloop unbundling may be deferred until July of this year.

"UNE-Us" or Unseparated Elements

BAVT's motion asks for further clarification of the set of customers must be supported through "UNE-Us," the term we previously introduced to describe unseparated sets of UNEs. It is undisputed that when BAVT has a retail customer receiving a service that amounts to the sum of two or more UNEs, if that customer then switches to a competitor, under the UNE-U concept, the competitor may henceforth obtain those UNEs in combination. The dispute concerns whether such combinations must also be available elsewhere.

When BAVT provides a retail services somewhere in its network that amounts to the sum of two or more UNEs, the question is whether BAVT must make that combination of UNEs available to serve other customers who do not presently purchase the retail service. In other words, the question is whether the UNE-U obligation applies to combinations that are currently combined to serve a particular customer, or to those that are "normally" combined but are not in fact combined for the customer in question. The FCC declined to rule on this question.[14]

The DPS supports the broader interpretation. It contends that BAVT should be required to offer a combination of network elements "that are not as yet connected for a particular customer if [BAVT] provides that same combination for any other customer" in BAVT's network.[15]

In the Final 5900 Order, we spoke to this question. In the Final 5900 Order, we stated:

> in offering UNE-U, Bell Atlantic must refrain from imposing any additional requirement on the CLEC that it does not impose on itself. So, for example, Bell Atlantic does not, for its own customers, physically separate loop from switch and then require the CLEC to recombine them at an interconnection cage. Therefore it may not do so for CLECs. Similarly, Bell Atlantic cannot impose an additional charge simply because a CLEC elects to purchase more than one UNE per end user.[16]

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14. Local Competition Third Report and Order at ¶ 479.

15. DPS objection to Motion for Reconsideration at 9-10.

16. Final 5900 Order at 100. The Final 5900 Order also made the slightly different comment that the UNE-U requirement does not require BAVT to "physically connect anything that it has not already connected to serve the same customer." *Id*. Today's Order revises the standard set out there.

Where BAVT offers or is willing to offer a retail service to a customer, to the extent that service can be constructed from a set of UNEs, we conclude that BAVT must offer one or more sets of comparable UNEs to its competitors. That is, BAVT must offer UNE combinations to its competitors in a manner that is similar to the manner it offers those elements to itself in order to provide retail service. Since most retail services are available throughout the entirety of BAVT's service region, the functional equivalent of the combination of elements equal to or a subset of that retail service must be made available on a wholesale basis to CLECs for the benefit of its customers or potential customers. In other words, the UNE-U must be made available not only as to end users who presently are BAVT customers, but as to all other end users who are similarly situated.

In reaching this conclusion, we were influenced by the difficulties that would arise from adopting its alternative. Under such a rule, for example, a UNE-based CLEC could acquire a new customer only by persuading its prospective customer to follow a two-step strategy. The CLEC would need to persuade the consumer first to establish a local exchange account with BAVT. Then, after achieving the status of an existing BAVT customer, the customer would then need to notify the CLEC and have the line switched over from retail service by BAVT to UNE service by the CLEC. Only at this point would the CLEC be eligible to order the UNE-Us needed to provide service to the customer. We conclude that to impose such a multi-step process on a CLEC would be likely to inhibit meaningful UNE-based competition. While we recognize that some UNE combinations may create legitimate technical difficulties, where a CLEC has acquired a new customer with a standard configuration of services, it would be neither just nor reasonable to force the CLEC or its customer through the meaningless exercise described above.

We are also influenced by the fact, described in a recent FCC order, that Bell Atlantic has for some time been providing UNE combinations in New York State. In its recent Order approving Bell Atlantic's entry into New York interLATA toll markets, the FCC found that:

> . . . Bell Atlantic . . . provides access to preassembled combinations of network elements. For example, Bell Atlantic has provided to competitors more than 152,000 preassembled platforms of network elements, including the loop switch combination (UNE-P) out of certain central offices, as well as local switching elements in combination with other shared elements, such as shared transport, shared tandem switching, operator services, directory assistance, and SS7

> signaling. In addition, Bell Atlantic provides Enhanced Extended Loops (EELs), a combination of loops and transport.[17]

We also conclude that where a Bell Atlantic Company offers a combination of elements in another state, BAVT should face a rebuttable presumption that the same combination must be offered in Vermont. BAVT should offer, via its SGAT and in interconnection agreements, the same set of UNE combinations in Vermont that any of its sister company offers to carrier customers or in other Bell Atlantic states. If BAVT does not offer any such combination, and if that fact is challenged, BAVT will be burdened to show why that combination is unduly burdensome, technically unfeasible, or, for some other reason, should not be offered in Vermont.

The particular combinations sought by a particular CLEC will depend upon that CLEC's competitive strategy and the extent of its own facilities. We recognize that on this record we cannot anticipate all of the combinations that a CLEC may desire. However, we anticipate that most CLEC requests will fall into regular patterns of combinations, and that the number of these requested combinations will be relatively small. Therefore, we require BAVT to initially offer those combinations of UNEs that will be most in demand by typical CLECs.

Given the limited record in this docket, we cannot anticipate with certainty which combinations will be most frequently sought by CLECs. Nevertheless, we do know that CLECs will adopt varying strategies to entry. Some will have significant switching and transmission facilities. Others may have more limited facilities. BAVT's combined UNE offerings should recognize these different wholesale market segments. We direct BAVT to ensure that it offers appropriate combinations[18] of elements for CLECs with each of the following configurations:

(1) a CLEC physically collocated at BAVT's wire center that will rely upon BAVT for switching;

(2) a CLEC physically collocated at BAVT's wire center that will provide its own dedicated transport to its own switch in or near Vermont;[19]

(3) a CLEC not collocated at BAVT's wire center that operates a switch in or near

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17. *Application by Bell Atlantic New York for Authorization under Section 271*, FCC 99-404, Dec. 22, 1999, at ¶ 233.

18. It may be necessary to consider elsewhere whether one combination or more than one combination is needed in each category listed here.

19. This circumstance may not require a combination of elements, since the CLEC may seek only to use BAVT's loop.

Vermont and operates its own transmission facilities at a point of presence near the BAVT wire center;

(4) a CLEC not collocated at BAVT's wire center and not operating its own transmission facilities but that operates a switch in or near Vermont; and

(5) a CLEC without any facilities in or near Vermont.

Several principles circumscribe BAVT's obligation to offer UNE-U combinations. First, BAVT need not offer combinations of elements that BAVT does not offer to itself anywhere in its service territory. These combinations, characterized in the Final 5900 Order as "UNE-Cs," are technically more challenging than existing combinations, and they present more complex legal issues. As we did in the Final 5900 Order, we decline here to mandate SGAT changes to include UNE-Cs.

Second, BAVT need not offer combinations of elements in geographic areas where the retail equivalent of those combinations are not available. For example, if BAVT currently offers a particular retail service in an area served by only one local switch, it need not geographically extend that service, in the form of UNE-Us, beyond that switch's service area. Also, BAVT need not provide a free line drop for a CLEC customer in locations where, under established policy, a free line drop would not be available to one of BAVT's own retail customers.

Third, BAVT need not offer a combination of UNEs that is not technically feasible. However, in any compliance dispute, BAVT will be burdened to demonstrate that this exception applies.

Legal Basis

In the Final 5900 Order, we based our UNE-U decision upon both state and federal law, with each providing an independent basis for our decision.[20] We still conclude that state law and federal law each provide an adequate and independent basis for the conclusions we have stated above.

First, we conclude that we have authority under federal law to issue today's Order directing BAVT to offer combinations of UNEs to customers not currently served by those combinations. The Telecommunications Act of 1996 states that an incumbent carrier must provide:

20. Final 5900 Order at 100.

> nondiscriminatory access to network elements *on an unbundled basis* at any technically feasible point on rates, terms and conditions that are just, reasonable, and nondiscriminatory. . . . An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.[21]

In sustaining an FCC rule that prohibited the incumbent from separating already-combined elements before leasing, the United States Supreme Court held that the statutory phrase, "on an unbundled basis," does not necessarily mean "physically separated," but means separated for pricing purposes.[22] The Supreme Court also noted that statutory language requires incumbent carriers to:

> provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

The Court indicated that this statute provides that network elements may be leased in discrete parts, but the statute "does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form."[23] The Court concluded that the FCC regulation prohibiting an incumbent carrier from separating already-combined network elements was not inconsistent with the Act. Following that Court decision, the FCC reinstituted its UNE-U rules.[24]

The FCC has not answered the question of whether its UNE-U rule requires BAVT to provide "normal" UNE-Us for an end user who is not currently served by BAVT.[25] It is possible, therefore, that the FCC would view a combination of UNEs for an end user not currently a customer amounts to be a new combination of elements that falls under different subsections of the FCC rules, in other words a UNE-C.[26] The UNE-C rule subsections were invalidated by the Eighth Circuit Court of Appeals, and the Supreme Court did not explicitly review that judgment. The FCC has asked the Eighth Circuit to reinstate its UNE-C regulations, and is awaiting the Court's judgment before attempting to enforce them.[27]

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21. 47 U.S.C. § 251(c)(3) (emphasis added).

22. *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S.Ct. 721, 737 (1999).

23. *Id*.

24. 47 C.F.R. § 51.315(b).

25. Local Competition Third Report and Order at ¶ 479.

26. 47 C.F.R. § 51.315(c)-(f).

27. Local Competition Third Report and Order at ¶ 475.

The rationale of the Supreme Court's *AT&T* decision leads us to conclude that the FCC regulations on UNE-C are a valid interpretation of section 251(c)(3) of the federal Act. The FCC's *Local Competition Third Report and Order*, in our view, makes some persuasive arguments on this point,[28] and the Ninth Circuit Court of Appeals has directly held that, in light of the Supreme Court's decision in *AT&T*, the original Eighth Circuit decision was in error.[29]

Even assuming for the sake of argument that resolving the current issue requires resort to the UNE-C concept, it still is not necessary to rely upon the presence of the FCC UNE-C rules. This Board has authority to implement section 251(c)(3) of the Telecommunications Act of 1996, and therefore we have authority to apply federal law to require that BAVT provide UNE-Cs as well as UNE-Us. In other words, federal law alone would permit us to require that BAVT offer combinations to wholesale customers without regard to whether the underlying end user is presently served.

Independently, we conclude that we may impose these requirements under state law. 30 V.S.A. § 203(5) gives this Board jurisdiction over companies offering telecommunications services to the public on a common carrier basis. The extent of the Board's authority is defined generally in 30 V.S.A. § 209, which allows the Board to issue orders to BAVT regarding the manner of operating and conducting its business. 30 V.S.A. § 209(a)(3). In addition, the Board has explicit statutory authority to mandate connections between two or more "telephone companies," after hearing, where their:

> lines can be made to form a continuous line of communication, by the construction and maintenance of suitable connections, for the transfer of messages or conversations, and that public convenience and necessity will be subserved thereby.[30]

We have decided to exercise this state authority in order to facilitate local exchange competition. We concur with the conclusions reached in the FCC Order that for effective local exchange competition to develop, competitors must have access to incumbent ILEC facilities in a manner that allows them to provide the services that they seek to offer. Despite the development

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28. Local Competition Third Report and Order at ¶¶ 481-82.

29. *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1121 (9th Cit., Oct. 8, 1999).

30. 30 V.S.A. § 2701. Under this section, the Board may order that a connection be made, and may also establish "through lines and joint rates, tolls and charges to be made and to be used, observed and enforced in the future."

of competition in some markets in some states, BAVT still controls the vast majority of the facilities that comprise the local telecommunications network within its service area. For this reason, BAVT enjoys cost advantages and superiority of economies of scale, scope, and ubiquity as a result of its historic, government-sanctioned monopoly. Because CLECs do not yet enjoy these same economies, they may be impaired if they do not have access, at least initially, to network elements supplied by BAVT. As a result, without access to unbundled network elements, a CLEC may choose not to enter a particular Vermont market because the cost and delays associated with deploying its own facilities would be too high given the revenues obtainable from that market and the relative attractiveness of other potential new markets. Similarly, a CLEC may decline to enter a Vermont market because certain of its facilities are subject to economies of scale and scope that prevent it, as a new competitor, from being competitive with the established carrier.

In deciding to require the offering of UNE-U, we seek to encourage the rapid introduction of competition in all markets, including residential and small business markets. We anticipate that the availability of UNE-Us in Vermont will provide reasonable certainty to CLECs regarding the availability of unbundled elements, and that this will allow them to attract investment capital and move forward with implementing national and regional business plans that will allow them to serve the greatest number of consumers in Vermont, utilizing both UNE facilities from BAVT and, eventually, their own facilities.

State authority in this area is explicitly preserved by the Telecommunications Act of 1996 and by applicable FCC interpretations. Federal statute law permits state commissions to impose additional unbundling obligations on incumbent LECs such as BAVT, so long as those obligations are consistent with section 251 of the Act and the national policy framework set out in the FCC's orders.[31] This supplemental state authority is explicitly recognized in FCC orders.[32] The FCC observed, and we agree, that state commissions that have imposed additional unbundling

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31. 47 U.S.C. § 251(d)(3). This section states that:

"In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part."

32. Local Competition Third Report and Order, at ¶ 154.

requirements, will need to periodically revisit such decisions to determine whether they continue to comply with FCC standards.[33]

In conclusion, based upon our authority in Vermont statutes, we direct BAVT to amend its SGAT in the manner described above.

Voice Messaging

In the Final 5900 Order, we directed BAVT to file an amendment to its SGAT to permit resale of voice messaging service at an appropriate discount. Our decision derived from two independent sources. Under federal law, we noted that the FCC had traditionally maintained a distinction between "telecommunications" and "information services." Nevertheless, we found that this traditional distinction had been overruled by two recent FCC decisions relating to Internet Service Providers and "Digital Subscriber Line" ("DSL") services. We concluded that under federal law the concept of "information service" no longer is necessarily excluded from "telecommunications" and that voice messaging, being a telecommunications service, must be offered for resale.

The alternative basis for our conclusion was state law. We concluded that voice messaging is "telecommunications" under state law and is therefore within the Board's authority regarding the manner of operating and conducting telecommunications business,[34] regarding the quantity and quality of any product[35] and to restrain a telecommunications company from any unjust discrimination.[36] Primarily as a matter of law and policy, we concluded that requiring BAVT to offer voice messaging for resale would increase the ability of the retail customers of CLECs to receive voice messaging services, and thereby promoted the convenience and accommodation of the public.

Disagreeing with our interpretation of the recent FCC orders, BAVT maintains that the FCC has not undermined the distinction between information and telecommunications. BAVT asserts that the fact that voice messaging information *stores* information makes voice messaging an information service and not telecommunications.[37] In a footnote to its motion, BAVT also

33. *Id*. at ¶ 156.

34. 30 V.S.A. § 209(3).

35. 30 V.S.A. § 209(1).

36. 30 V.S.A. § 209(a)(6).

37. BAVT has not filed tariffs for voice messaging, although it appears that some similar services are available to Centrex customers through "Simplified Message Desk Interface" ("SMDI"), which includes the feature of "voice

disagreed with our state law conclusions, arguing that voice messaging is "storage and retrieval" of information, not "transmission" of information, and thus is not telecommunications under state law.

The DPS supports the conclusion and rationale of the Final 5900 Order. Under federal law, the DPS agrees that the "thrust of the Internet traffic orders is that an information service can also be a telecommunications service." Under state law, the DPS asserts that voice mail "reproduces the voice of the sender albeit at a later time, without changing its form or content," and the fact that reproduction occurs later in time is not material.

We have concluded that we should not alter our decision as stated in the Final 5900 Order. We do, however, narrow the legal basis for our decision solely to state law. Although this phase of the Docket is primarily concerned with compliance with the federal "competitive checklist," the federal law is not clear. To the extent that it has spoken on the issue, the FCC does appear to have fairly recently recited its traditional conclusions that information services are not telecommunications. If the FCC were to express an opinion today, it might say that the barrier between information service and telecommunications still exists.[38] We still believe such a statement is fundamentally inconsistent with the FCC's decisions in the Internet cases. Nevertheless, because of the uncertainty in federal law, we decline to base our conclusion here upon that federal law.

Under state law, a service is telecommunications if it is interactive. The service of voice messaging consists of the recording, a time delay, and the recovery. It is undisputed that the recording of a voice message is interactive telecommunications. The calling party establishes a circuit and transmits information, all the while receiving instructions from programs in the switch. Likewise, it is also undisputed that the recovery of a voice message is interactive telecommunications. A customer calls a predefined number and, responding to instructions from switch software, retrieves information that already is on file in a location accessible to the switch.

The only remaining issue is whether the time delay between the recording function and the recovery function converts the service, under state law, from interactive telecommunications into

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store and forward." *See*, BAVT Tariff, § 7.11.B.

38. This if far from certain, however. There remain substantial uncertainties about the FCC's understanding of the scope of "information services." The FCC recently noted, for example, that it has not yet decided whether the "provision of Internet access through a cable modem is a cable service, telecommunications service, or information service." Line Sharing Order, *supra.*, at ¶ 59.

something else. We conclude that it does not. Where a service consists of two interactive telecommunications functions, the fact that those functions are separated in time does not deprive the service of its character as interactive telecommunications.

We note that customers using the ILEC-provided form of voice messaging experience increased functionality over the form based on customer-owned equipment. First, the ILEC-provided version of voice messaging is available at all times, including when the customer otherwise has the circuit in use. Second, ILEC-based voice mail service performs functions not available on customer-based systems. This includes, for example, the ability to forward voice mail to a different telephone number; and this is equivalent to the Call Forwarding function now offered by BAVT under tariff as a telecom service. It is also possible for an ILEC's voice mail customer to make advance arrangements to automatic forwarding of all voice mail. If there were any doubt that voice mail is telecommunications, this enhanced functionality available through ILEC-based systems should remove that doubt.

In summary, voice messaging, as currently offered by BAVT, is a telecommunications service under state law. Accordingly, we direct BAVT to file tariffs describing voice messaging as a retail service and to offer it for resale through its SGAT.

OSS Response Time

In our Final Order, we accepted the Hearing Officer's recommendation that BAVT be required to demonstrate that it provides more rapid responses to "preorder inquiries" through its Operations Support System ("OSS"). Accordingly, we directed BAVT to demonstrate that it has met its stated goal of a four-second response time as to all types of CLEC preordering inquiries. On our own initiative, we reopen that question here.

Based upon comments of the parties and our review of the record, it appears that Bell Atlantic has aspired only to provide an average response time to preorder inquiries that is not more than four seconds longer than it responds to its own customer service representatives. The Final 5900 Order should be suitably amended.

Compliance Filings

While we provide substantial guidance to BAVT in this Order, we recognize that there remain many possible issues, particularly those involving UNEs that may arise when compliance

filings are made pursuant to today's Order. Because this docket was created primarily to evaluate other questions, if those compliance filings are challenged in a way that raises complex technical issues, we may elect to resolve them in a new docket. If the compliance filings do not raise such issues, this docket will be closed.

Order

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. Except as noted herein, Bell Atlantic's Motion for Reconsideration is denied.

2. Within 30 days of this Order, Bell Atlantic shall make the following changes to its Statement of Generally Available Terms (SGAT):

   a. allow CLECs to purchase unseparated UNEs in a manner consistent with the discussion in the orders in this docket;

   b. delete the provisions authorizing a 10 percent markup on pole attachment work;

   c. make reference to the appropriate pole attachment tariff;

   d. permit resale of toll service at an appropriate discount;

   e. permit resale of voice messaging service at an appropriate discount.

3. Within 30 days of this Order, Bell Atlantic shall file tariffs describing its retail voice messaging service.

4. Within 60 days of this Order, Bell Atlantic shall prepare and file with the Board a list showing the approximate square footage in each central office that is unoccupied and that could support physical collocation by CLECs, and shall make this list available to CLECs upon request.

5. Within 60 days of this Order, Bell Atlantic shall file a compliance filing demonstrating that it has met its stated goal of achieving an average response time as to all types of CLEC preordering inquiries that is within four seconds of its average response time for inquiries by its own customer service representatives.

6. This docket shall remain open for possible review of Bell Atlantic's compliance filings. If the amendments required above are made and no objection is made within 30 days thereafter, this docket shall be closed.

DATED at Montpelier, Vermont, this 31st day of January, 2000.

s/Michael H. Dworkin)
)
) PUBLIC SERVICE
)
s/Suzanne D. Rude) BOARD
)
) OF VERMONT
s/David C. Coen)

OFFICE OF THE CLERK

Filed: January 31, 2000

Attest: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board of any technical errors, in order that any necessary corrections may be made.

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.

ATTACHMENT 3

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 5900

Joint Petition of New England Telephone	)
& Telegraph Company d/b/a NYNEX,	)
NYNEX Corporation, and Bell Atlantic	)
Corporation for approval of a merger of a	)
wholly-owned subsidiary of Bell Atlantic	)
Corporation into NYNEX Corporation	)

Order Entered: 9/21/2000

CLOSING ORDER

In an Order issued on June 29, 1999, this Board directed New England Telephone and Telegraph Company d/b/a Bell Atlantic-Vermont ("Bell Atlantic") to file amendments to its Statement of Generally Available Terms ("SGAT"). Those amendments concerned unseparated unbundled network elements ("UNEs"), pole attachments, resale of toll service and resale of voice messaging. The Order also provided that if the SGAT were successfully amended as required by the Order, and if no objection were made within 30 days, then this docket would be closed.

On several occasions, Bell Atlantic subsequently filed SGAT amendments, most recently on July 27, 2000. On their face, these SGAT amendments appear to address the obligations imposed on Bell Atlantic in the June, 1999 Order. For example, Bell Atlantic responded to the unseparated UNE requirement in the Order by including in the SGAT provisions dealing with "expanded extended loops,"[1] "switch sub-platform combinations"[2] and "UNE platforms."[3]

No party has filed an objection to the SGAT within 30 days after its filing. In a letter dated July 25, 2000, and responding to an earlier version of the SGAT, the Vermont Department of Public Service ("Department") recommended that the Board allow the SGAT into effect subject to ongoing review but without explicit review and approval. In Docket 5713, the Public Service Board allowed the SGAT to take effect, while preserving the Board's right to review it pursuant

1. Section 5.10.
2. Section 5.11.
3. Section 5.12.

to 47 U.S.C. § 252(f)(4).[4]

For the above reasons, and in accordance with our intention expressed in the Order of June, 29, 1999, we conclude that the July 27, 2000 SGAT filing is in compliance with our previous Order, and this docket is closed.

DATED at Montpelier, Vermont, this 21st day of September, 2000.

s/Michael H. Dworkin)
)
) PUBLIC SERVICE
)
s/David C. Coen) BOARD
)
) OF VERMONT
)

OFFICE OF THE CLERK

Filed: September 21, 2000

Attest: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or mail) of any technical errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

4. Docket 5713, Order of 8/23/00.

ATTACHMENT 4

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held October 12, 2001

Commissioners Present:

Glen R. Thomas, Chairman
Robert K. Bloom, Vice Chairman
Aaron Wilson, Jr.
Terrance J. Fitzpatrick

Petition of Yipes Transmission, Inc. for Arbitration Pursuant to Section 252(b) of Telecommunications Act of 1996 to Establish an Interconnection Agreement With Verizon Pennsylvania, Inc.

A-310964

OPINION AND ORDER

BY THE COMMISSION:

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I. HISTORY OF THE PROCEEDINGS

This matter is the arbitration of unresolved issues, resulting from the negotiation of an interconnection agreement between Yipes Transmission, Inc, (Yipes) and Verizon Pennsylvania Inc., (Verizon). On June 25, 2001, Yipes filed a Petition requesting arbitration of interconnection agreement with Verizon pursuant to Section 252(b) of the Telecommunications Act of 1996 (TA-96), 47 U.S.C. §252(b), and the Commission's *Implementation Orders*.[1] The Yipes Petition sought arbitration of twenty-six unresolved issues in an interconnection agreement between Yipes and Verizon. Subsequently, Verizon filed an Answer to the Petition.

The matter was then assigned to presiding Administrative Law Judge (ALJ) Wayne L. Weismandel, acting as arbitrator, pursuant to the Commission's *Implementation Orders*. An Initial Pre-Arbitration Conference was held before ALJ Weismandel on July 12, 2001. Pursuant to a July 12, 2001 Arbitration Proceeding Order, both Parties filed Initial Offers on July 24, 2001. An Arbitration Conference was held on July 27 and 30, 2001. Each party presented witnesses and introduced exhibits, which were admitted into the record, without objection. On August 6, 2001, Yipes and Verizon filed their respective Final and Best Offers (FBO).

On August 20, 2001, the Recommended Decision (R.D.) of ALJ Weismandel was issued. The Recommended Decision addressed and provided

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[1] *In re: Implementation of the Telecommunications Act of 1996*, Docket No. M-00960799 (Order entered June 3, 1996; Order on Reconsideration entered September 9, 1996).

recommendations on the remaining unresolved issues.[2] On September 5, 2001, both Parties filed their respective Exceptions to the Recommended Decision.

Subsequently, on September 17, 2001, Yipes filed a Motion to Strike Portions of Verizon's Exceptions (Motion). On September 27, 2001, Verizon filed a Response in Opposition to Yipes' Motion (Verizon's Response).

The proceeding is now ripe for disposition by the Commission.

[2] The ALJ notes that as a result of the parties' continuing negotiations during the course of the arbitration proceeding, the twenty-six unresolved issues were reduced to eleven issues when the Final Best Offers were submitted. (R.D., p. 3).

II. DISCUSSION

A. Yipes' Motion to Strike

1. Yipes' Position

In its Motion, Yipes urges the Commission to strike portions of Verizon's Exceptions, arguing that Verizon presented impermissible new extra-record information and disputed facts of a material nature, for the first time, in two of its Exceptions.

Specifically, Yipes maintains that paragraphs 19-21 of Verizon's Exceptions, which are offered as support for Verizon's objections to the ALJ's recommendation for Issue #3, contain new rationale and raise a new material disputed fact. (Motion, p. 6). Yipes explains that Verizon announces for the first time in this proceeding that "a piece of dark fiber loop accessed at a splice point is not 'subloop' at all under the FCC definitions" and is not consequently subject to unbundling requirements. (Motion, pp. 6-7, citing Verizon's Exceptions, p. 9). Despite having had ample opportunity to raise this claim either in its Answer to the Petition for Arbitration, its Initial Offer or its Best Final Offer, Verizon failed to raise or discuss this claim during the arbitration proceeding. (Yipes Motion, p. 7). As a consequence, Yipes argues that to permit Verizon to make this claim at this juncture, would deny Yipes the opportunity to dispute Verizon's claim on the record.

Yipes also requests that the Commission strike the last two sentences of paragraph 30 of Verizon's Exceptions relating to Issues #1 and #2. In addition to arguing that these sentences are extra-record statements that could have been presented on the record, Yipes further asserts that Verizon's new claims, as stated in these sentences, are misleading and contradict the sworn testimony of Verizon's witness. Yipes points out that instead of referencing the sworn testimony of its witness that once fiber is laid in the

network to the entry point of a building, the cable is terminated inside the building, Verizon offers for the first time the proposition that it may run the cable to the building but terminate the cable at a later time. According to Yipes, Verizon, in its Exceptions, seeks to import a new factual issue based on extra-record evidence that contradicts the on-the-record testimony of Verizon's witness. (Yipes Motion, pp. 12-13).

As noted, Yipes urges the Commission to strike the above cited portions of Verizon's Exceptions, as extra record information. In the alternative, Yipes states that if the Commission is not inclined to grant Yipes' Motion and strike portions of Verizon's Exceptions, that it should grant it leave to file substantive responses to Verizon's purported new claims. (Motion, p. 3).

2. Verizon's Response

On September 27, 2001, Verizon filed a Response in Opposition to the Motion to Strike (Response). In its Response, Verizon argues that its legal arguments are based on interpretations of the FCC *UNE Remand Order* and FCC Rules previously referenced in this proceeding. With respect to its best practices and subloop arguments, Verizon maintains that it has not asserted any new facts, but merely raised a new legal argument based on an FCC order and regulations cited by the ILEC in the record. (Verizon's Response, p. 5).

Verizon further asserts that it is appropriate to raise new legal arguments in Exceptions if the new arguments are based on record evidence. Verizon explains that because its best practices and sub loop arguments are based on the *UNE Remand Order* and FCC Rules, the Commission should entertain Verizon's legal argument.

In addition, Verizon disputes Yipes' contention that Verizon's Exceptions rely on extra record evidence that is contrary to sworn testimony in this proceeding. With

respect to its Exceptions to unresolved Issues Nos. 1 and 2, Verizon argues that the sentences referenced by Yipes in its Motion are not new factual issues, but provide explanation of its disagreement with the ALJ's Recommended Decision. Verizon urges the Commission to deny Yipes' Motion and consider its Exceptions.

3. Disposition

At the outset, we disagree with Verizon's characterization of the assertions made in its Exceptions. Indeed, Verizon's contention that the assertions made in its Exceptions are mere explanations of disagreement with the ALJ's Recommended Decision is a far-reaching proposition. Verizon's position, as we understand it, is that a piece of a dark fiber loop that is accessed at a splice point is not a "subloop" under the FCC's definition. Thus, Verizon contends that if the Commission were to order access to dark fiber at splice points, it would add a new UNE, which would require this Commission to conduct an investigation under the "necessary" and "impair" standards under TA-96 and the FCC rules. This position constitutes more than a mere expression of discontentment with the ALJ's recommendations.

We also note that had Verizon offered even a hint that its position was that access to dark fiber at splice points was not a subloop and a UNE, the ALJ as well as Yipes would have addressed that argument during this proceeding. Interestingly, Verizon does not reference any specific instance where it was even suggested that this was its position regarding access to dark fiber at splice points. This omission is particularly noteworthy since this arbitration proceeding is not the first instance where the Commission has addressed the issue of access to dark fiber at splice points. (*See Interim UNE Opinion and Order, infra*, pp. 56-58). The *Interim UNE Opinion and Order* provided notice to Verizon and all telephone carriers in Pennsylvania that the Commission would explore the issue of splicing points for access to dark fiber. If Verizon's position were that access to dark fiber at splice points was not a UNE, the

argument now offered in its Exceptions should have been advanced during this proceeding.

Upon consideration, we shall grant Yipes' Motion. Our review of the record indicates that Verizon's argument as stated on pages 8 through 11 of its Exceptions was not previously raised in this proceeding. In short, in Exceptions to the Recommended Decision, Verizon takes the position, for the first time, that " the 'best practice' rule does not apply when a commission seeks to add a new Unbundled Network Element (UNE) to the national list of network elements to which ILECs [incumbent local exchange carriers] must provide unbundled access." Within this discussion, Verizon broadly remarks that a dark fiber loop accessed at the splice point is not a subloop under the FCC's definition and, consequently, not a UNE that must be unbundled under the *UNE Remand Order*.[3] (Verizon Exc., p. 9). Further, Verizon states that if we were to direct such access, we would have to add a new network element to the national list which requires the Commission to engage in a necessary and impair standards analysis under 47 C.F.R. §51.317.

We agree with Yipes that it would be fundamentally unfair for the Commission to consider this portion of Verizon's Exceptions. Since the Parties will not file Replies to Exceptions, Yipes would not have an opportunity to respond to Verizon's contention. Moreover, Verizon offers no reason why this argument was not, or could not, have been previously made during the course of the proceeding. Given the abbreviated procedural schedule for the arbitration process, we endeavor to ensure that each Party is afforded adequate procedural due process. As such, we will strike paragraphs 19-21, and the last two sentences of paragraph 30 of Verizon's Exceptions.

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[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238 (November 5, 1999).

B. Issues to Which No Exceptions Have Been Taken

Before addressing the Exceptions to the ALJ's Recommended Decision, we note that there are a number of issues initially identified as being unresolved, for which the ALJ recommended resolutions, and to which no Party filed exceptions or objections. A review of the respective Exceptions filed by Yipes and Verizon indicates that no objections were filed to the ALJ's recommendations on the following issues:

> **Issue # 7**
>
> Whether Verizon may arbitrarily limit Yipes to up to 25% of the available dark fiber or four strands of dark fiber (whichever is greater) in any given segment of Verizon's network during any two-year period? (UNE Attachment 7.4.10)
>
> **Issue # 10**
>
> Whether Verizon may reserve spare fiber for future network growth? (UNE Attachment 7.4.10.3)
>
> **Issue # 23**
>
> Whether the definition of the term "Local Traffic" should specify that "Local Traffic" does not include any "Internet Traffic"? (Glossary Attachment 2.57)

Our primary focus in a review of Recommended Decisions in arbitration proceedings is the Parties' objections and exceptions related to unresolved issues and concerns. In the instant proceeding, the Parties have elected not to file objections to the ALJ's recommendations on Issues No. 7,10, and 23. As such, we will view this election as an indication that the Parties have either accepted the ALJ's recommendations on these issues, or that the Parties have reached a subsequent "meeting of the minds" which eliminated the need to file exceptions to the ALJ's recommendations on these issues.

Accordingly, we will adopt the ALJ's recommendations on Issues No. 7, 10, and 23, and direct that the final interconnection agreement to be filed consistent with our determinations herein, incorporate the ALJ's disposition of these issues. We will now consider the remaining unresolved issues in this arbitration proceeding.

C. Unresolved Issues

1. Issues #1 and #2

Whether Verizon may deny access to available dark fiber anywhere in the network solely because the fibers are not already attached to Verizon's fiber panel, accessible terminal or similar fiber termination equipment at the time of Yipes' request? (UNE Attachment 7.4.5)

Whether Verizon may deny access to dark fiber if there is no Verizon provided fiber panel, accessible terminal or similar fiber termination equipment and even if Yipes wants to provide its own fiber panel, accessible terminal, or similar fiber termination equipment? (UNE Attachment 7.4.1 and 7.4.2)

a. Positions of the Parties

At the July 27, 2001 Arbitration Conference, the Parties represented to the ALJ that they had reached an agreement in principle with respect to these issues, but were unable to agree on the specific language to implement their agreement. (R.D., p. 6 citing Tr. 124-125). As such, these issues were submitted to the ALJ to arbitrate specific contract language. During the July 27, 2001 Arbitration Conference, the Parties agreed that their agreement in principle was as follows:

> It is Verizon's standard practice that when a fiber optic cable is run into a building or remote terminal, all fibers in that cable will be terminated on a Verizon accessible terminal in the building or remote terminal. Should a situation occur in

> which a fiber optic cable that is run into a building or a remote terminal is found to not have all of its fibers terminated, then Verizon agrees to complete the termination of all fibers in conformance with its standard practices and to do so expeditiously at the request of Yipes.

(Tr., p. 125; statement of counsel for Yipes).

Verizon's proposal to implement the agreement in principle entailed the addition of a new Section 7.4.2.1, to the UNE Attachment to the Yipes-Verizon Interconnection Agreement, and stated as follows:

> 7.4.2.1 It is Verizon's standard practice that when Verizon places a fiber optic cable to terminate in a building or remote terminal, all fibers in that cable will have pre-installed connectors and will be terminated on a Verizon accessible terminal in the building or remote terminal. It is also Verizon's standard practice that when Verizon places a fiber optic cable to pass through a building or remote terminal, the fibers in that cable will not have pre-installed connectors. If and when Yipes identifies a fiber optic cable that has been placed in a building or a remote terminal, but does not have all of its fibers terminated on a Verizon accessible terminal, then Verizon agrees to notify Yipes when Verizon plans to complete the termination of all fibers in that fiber optic cable in conformance with its standard practices or to inform Yipes that such fiber optic cable will pass through that building or remote terminal and will not be terminated in that building or remote terminal. Upon request, Verizon will terminate fibers with pre-installed connectors to a Verizon accessible terminal at time and material charges. Verizon will not, at Yipes request, perform or accelerate the performance of any fiber construction including, but not limited to, placing fiber facilities and equipment in Verizon premises, splicing fiber cables, and installing accessible terminals.

To implement the agreement in principle, Yipes proposed the following modifications to Sections 7.4.1, 7.4.2, and 7.4.5 of the UNE Attachment:

7.4.1 Verizon shall be required to provide a Dark Fiber Loop only where one end of the Dark Fiber Loop terminates at Verizon's Accessible Terminal in Verizon's Central Office that can be cross-connected to Yipes's collocation arrangement located in that same Verizon Central Office and the other end terminates at the customer premise. Verizon shall be required to provide a Dark Fiber Subloop only where (1) one end of the Dark Fiber Subloop terminates at Verizon's Accessible Terminal in Verizon's Central Office that can be cross-connected to Yipes's collocation arrangement located in that same Verizon Central Office and the other end terminates at Verizon's Accessible Terminal at a Verizon remote terminal equipment enclosure that can be cross-connected to Yipes's collocation arrangement or adjacent structure.

It is Verizon's standard practice that when a fiber optic cable is run into a building or remote terminal that all fibers in that cable will be terminated on a Verizon accessible terminal in the building or remote terminal. Should a situation occur in which a fiber optic cable that is run into a building or a remote terminal is found to not have all of its fibers terminated, then Verizon agrees to complete the termination of all fibers in conformance with its standard practices, and to do so expeditiously at the request of Yipes. Nothing contained herein shall require Verizon to terminate a fiber optic cable that runs through a remote terminal in that remote terminal where the fiber optic cable is engineered and constructed to run through the remote terminal en route to termination in another remote terminal or the central office; and nothing contained herein shall require Verizon to terminate a fiber optic cable that runs through a building in that building in the rare instance where the fiber optic cable is engineered and constructed to run through the building en route to another termination point, but if Verizon terminates any fiber optic strands from the fiber optic cable running through a building in that building, the fiber optic strands shall be terminated in accordance with Verizon's standard practice as stated herein. Upon request by Yipes, Verizon shall produce documentation demonstrating that the fiber optic cable(s) referred to in the previous sentence was (were) originally engineered and constructed to run through the remote terminal and/or building, as the case may be. Verizon will not, at Yipes' request, perform or accelerate the performance of any fiber

construction but Verizon shall adhere at all times to its standard practices, including, but not limited to, placing fiber facilities and equipment in buildings or remote terminals, splicing fiber cables, and installing accessible terminals.

A [competitive local exchange carrier] CLEC demarcation point shall be established either in the main telco room of a building where a customer is located or, if the building does not have a main telco room, then at a location to be determined by Verizon. Verizon shall connect a Dark Fiber Loop to the demarcation point by installing a fiber jumper.

7.4.2 Yipes may access a Dark Fiber Loop or a Dark Fiber Subloop only at a pre-existing Verizon Accessible Terminal of such Dark Fiber Loop or Dark Fiber Subloop, and Yipes may not access a Dark Fiber Loop or a Dark Fiber Subloop at any other point, including, but not limited to, a splice point. Except where required by Applicable Law, Verizon will not introduce additional splice points or open existing splice points or cases to accommodate a CLEC's request.

7.4.5 Unused fibers in a fiber splice point or case located outside the Customer premises are not available to Yipes.

b. ALJ Recommendation

The ALJ recommended adoption of the Yipes' proposal. (R.D., pp. 9-10). ALJ Weismandel was persuaded that Yipes' language more appropriately embodied the Parties agreement in principle based on the testimony of Verizon's witness with regard to Verizon's current standard practice. The ALJ referenced the specific Verizon testimony that every Verizon outside fiber cable has a connectorized cable attached to it and has a patch panel installed with connectors plugged into the patch panel, so that there is a complete path ending at the termination point at the fiber patch panel. (Tr., p. 111-112). ALJ Weismandel concluded that Verizon's proposal would allow it to deviate from its current standard practice and merely advise Yipes when it might attach the connectized cable to the outside fiber cable and terminate the path at a fiber patch panel. The ALJ determined that Yipes' proposal reflected an almost verbatim incorporation of the

agreement in principle, leaving Verizon with the added protection of not having to make termination points for Yipes that the ILEC did not intend to make for itself. (*See* R.D., pp. 9-10).

c. Exceptions

Verizon excepts to the ALJ's recommendation. Verizon agrees with the ALJ's finding that the ILEC should not be obligated to make termination points for Yipes that the ILEC did not plan to make for itself or facilitate requests from the CLEC to accelerate the performance of any fiber construction. However, Verizon does not believe that the ALJ's recommended language clearly captures this proposition. Verizon explains that while the ALJ's recommended contract language requires it to expeditiously complete termination of fibers at Yipes' request, there is no definition of "expeditiously" in the proposed language. According to Verizon, it understood this term to mean that the ILEC would simply complete termination in a manner consistent with its standard practice. In addition, Verizon is concerned that the ALJ's recommended language would impose a duty upon it to accelerate its construction efforts, despite the fact that such delays may result from matters or events outside the control of Verizon. In Verizon's view, the ALJ's recommended language is ambiguous and does not plainly reflect the Parties' agreement in principle.

Based on the foregoing, Verizon urges the Commission to reject the ALJ's recommendation and adopt the following language which, according to Verizon, addresses the ambiguities of the ALJ's recommended language and is consistent with the agreement in principle:

> It is Verizon's standard practice in Pennsylvania that when Verizon runs a fiber optic cable to terminate in a building or remote terminal, all fibers in that cable will be terminated on a Verizon accessible terminal in the building or remote terminal. Should a situation occur in which a fiber optic

cable that it run into a building is found to not have all of its fibers terminated, then Verizon agrees to complete the termination of all fiber within the fiber optic cable in a timely manner in conformance with its standard practices. If Verizon has not yet scheduled a date for termination of the fibers in the building or remote terminal, or if the date established for such termination in Verizon's construction schedule has passed, Verizon will terminate the fibers in the fiber optic cable as soon as reasonably practicable at Yipes' request. Verizon will not, at Yipes request, perform or accelerate the performance of any fiber construction. Nothing in this section shall apply to fiber optic cable that is engineered and constructed to run through a building or remote terminal en route to termination at another location.

d. Disposition

As stated by Verizon, the Parties reached an agreement in principle that Verizon will follow its standard construction practices and not leave dark fiber unterminated at the fiber patch panel and out of available inventory for an indefinite period of time. (*See* VZ Exc., p. 14, citing Tr. 124-125).

Verizon's concern with Yipes' proposed language is that it emphasizes that it did not agree to language that would, or could be interpreted, to impose an affirmative obligation on Verizon to perform construction or accelerate its normal construction schedule at the CLEC's request. (VZ Exc., pp. 14-15). Through pages 15-17 of its Exceptions, Verizon extensively details its concern relative to protecting itself from any language which suggests that it have to make termination points for Yipes that it did not plan to make for itself, or to honor requests from Yipes to perform or accelerate fiber construction.[4]

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[4] Verizon references this Commission to the often-cited statement of the United States Court of Appeals that TA-96 requires unbundled access only to an ILEC's existing network and not to a yet unbuilt superior one. (VZ Exc., p. 15, n.16, citing *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *aff'd in part and rev'd in part, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

On review of Verizon's Exceptions on this issue, its concerns may be distilled to its objection to the use of the word "expeditiously" in Yipes' proposal. Specifically, Verizon states that:

> [I]n reaching the agreement in principle, Verizon PA understood the term "expeditiously" to mean that Verizon PA would terminate the fibers in a building or remote terminal in a timely fashion pursuant to its standards practices, and would not leave fibers unterminated for an indefinite period at the customers premises or remote terminal. *Consistent with that understanding, Verizon PA should only be required to complete construction of fiber facilities in the same manner and within the same time frame as Verizon PA does so for itself in the normal course of business.*

(Verizon Exc., pp. 16-17) (Emphasis added).

We shall, grant Verizon's Exceptions, in part. We shall direct that the word "expeditiously" be deleted from the Yipes proposal and replaced with the words taken from Verizon's proposal "in a timely manner in conformance with Verizon's standard practices."

We further agree with the ALJ that the Yipes proposal reflects the Parties' agreement in principle. With respect to Verizon's concern that it not be subject to an affirmative duty to accelerate its construction efforts, we do not interpret the ALJ's recommended Section 7.4.2 as imposing such a duty. In fact, that section expressly relieves Verizon of a duty to accelerate construction at Yipes request. Verizon's duty under this Section is to adhere to its standard practices which in our view would include the standard practices normally engaged by the ILEC in response to events triggered by

unforeseen occurrences. The "yard stick" is that Verizon adhere to its standard practices. As such, we do not find that Verizon's second proposed language[5] is appropriate.

2. Issue #3

Whether Verizon pursuant to the FCC UNE Remand Order "best practices" mandate, should be required to provide access to dark fiber at splice points, as it does in Massachusetts? (UNE Attachment 7.4.2 and 7.4.5).

a. Positions of the Parties

This issue addressed Verizon's obligations to provide access to dark fiber at splicing points. The Parties agreed on a number of matters relative to this issue: (1) dark fiber is a subloop that must be accessible as an UNE where technically feasible; (2) the Massachusetts Department of Telecommunications and Energy (Mass. DTE) concluded that Verizon MA must provide CLEC access to dark fiber at existing splice points on the ILEC's network;[6] and (3) the Massachusetts and Pennsylvania networks are not so fundamentally different so as to make CLEC access at existing points technically infeasible in Pennsylvania. (R.D., pp. 10-11). However, the Parties disputed whether the "best practices" mandate established in the FCC *UNE Remand Order*[7] applied to this issue. Verizon took the position that the best practices presumptions, as interpreted in the

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[5] We note that Verizon elected not to offer the language proposed in its Exceptions, in its Final and Best Offer.

[6] Consolidated Petitions of New England Telephone and Telegraph Co. d/b/a NYNEX, Teleport Communications Group, Inc., Brooks Fiber Communications, AT&T Communications of New England, Inc., MCI Communications and Sprint Communications Co., L.P., pursuant to Section 252 of the Telecommunications Act of 1996, for Arbitration of Interconnection Agreements Between NYNEX and the Aforementioned Companies, D.P.U. 96-73/74, 96-80/81, 96-94 – Phase 3 Order (December 4, 1996).

[7] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking , CC Docket No. 96-98, FCC 99-238 (November 5, 1999).

Massachusetts' decision[8], would not apply because that order preceded the FCC's best practices mandate in its *UNE Remand Order*.

b. ALJ Recommendation

With regard to the best practices mandate, the ALJ first determined that Verizon's contention that since the Mass. DTE decision was issued prior to the FCC's *UNE Remand Order* it should not be given retroactive effect, was of no moment in this proceeding. ALJ Weismandel observed that, on two occasions after issuance of the *FCC UNE Remand Order,* the Mass. DTE upheld its earlier holding with respect to an ILEC's obligation to provide CLEC access to dark fiber at existing splice points on the ILEC network. (R.D., p. 11-12).

Secondly, the ALJ noted that the Indiana Utility Regulatory Commission (Indiana Commission) recently concluded that an ILEC must provide access at both existing and new splice points on its network. After further noting that Verizon failed to demonstrate that the differences between the Indiana and Pennsylvania networks were such that it is not technically feasible for Verizon to provide unbundled access to the dark fiber subloop element at existing splice points in its network, the ALJ recommended adoption of Yipes' proposed language, and concluded that Verizon be directed to provide CLECs such access. (R.D., pp. 10-12). In addition, the ALJ held that the FCC's "best practices" mandate applies to this issue.

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[8] We note that Verizon does not dispute that the Massachusetts Commission directed access at splice points but merely represents that no Massachusetts CLEC has requested such access in Massachusetts. (VZ. Exc., p. 7). Assuming arguendo that Verizon's assertion is accurate, that does not negate the fact that the Massachusetts decision concluded such access should be allowed.

c. Exceptions

Yipes agrees with the ALJ's recommendation on Issues No. 1 and No. 2, as previously addressed in this Opinion and Order. However, in view of the ALJ's recommendation on Issue No. 3, that Verizon is required to provide access at existing and new splice points, Yipes believes that the specific language in its proposed Sections 7.4.2 and 7.4.5 for a proposed interconnection agreement should be revised to reflect the ALJ's recommendation. According to Yipes, while the ALJ recommended adoption of Yipes' proposed language for Issues No. 1, and No. 2, he did not adjust the language of Sections 7.4.2 and 7.4.5 to reflect his recommendation that access should be made at existing as well as new splice points. Yipes suggests that its proposed modifications to Sections 7.4.2 and 7.4.5, as stated on page 11 of its Exceptions, are necessary to properly implement the ALJ's recommendations on Issues Nos. 1, 2, 3, and 5.

Conversely, in its Exceptions, Verizon urges the Commission to flatly reject the ALJ's recommendation on this issue. The ALJ's recommendation, according to Verizon, is unsupported by the record. Verizon asserts that the record established that splice points are not technically feasible access points for dark fiber in Pennsylvania and elsewhere. Verizon points out that its witness testified that fiber optic strands are inherently brittle and generally unusable if spliced and re-spliced a few times. (Verizon Exc., p. 11). Yipes' witnesses did not dispute this testimony. Verizon further explains that while it creates splices in its own cable to construct its network, these connections are permanent and are not, as normal business practice, reopened. Unlike these types of splices, multiple splices would be required to connect and disconnect the ordered UNEs of multiple competitive carriers over a period of time. Further, Verizon is not reassured by Yipes' contention that, rather than reopen a splice in the same fiber frequently, the CLEC will reopen the same splice case to access different fibers within the ribbon or cable. This is because, according to Verizon, splicing within a given fiber ribbon adversely impacts the service on other fibers within the ribbon. (Verizon Exc. p. 12).

Verizon argues that the Commission should adopt its proposed language for Sections 7.4.2 and 7.4.5, which provides that Yipes may only access dark fiber at existing accessible terminals, not at splice points.

d. Disposition

As the ALJ noted in his recommended decision, the FCC established a best practices rule in its *UNE Remand Order*. Specifically, the FCC stated that:

> Our approach to subloop unbundling reflects the network as it exists today. Technology may develop, however, in ways that would render this approach too limiting. For that reason, we establish a further rebuttable presumption that, once one state has determined that it is technically feasible to unbundle subloops at a designated point, it will be presumed that it is technically feasible for any incumbent LEC, in any other state, to unbundle the loop at the same point everywhere. If the conditions surrounding a request for unbundling at a similar point differ to such an extent that it is not technically feasible for the incumbent to provide unbundled access to that subloop element, the incumbent will have the burden of demonstrating in a section 252 arbitration proceeding that such an arrangement is indeed not technically feasible under those different conditions. For example, Texas requires subloop unbundling at the remote terminal. If a competitive LEC seeks unbundled access to a subloop at the remote terminal from an incumbent LEC in New York, the burden rests with the New York incumbent LEC to prove that its own situation differs to such an extent that the Texas arrangement is not technically feasible. We believe that this "best practices" approach insures that incumbent LECs do not limit access to subloops based on unforeseeable technological and infrastructure developments.

We do not share Verizon's opinion that it established in this proceeding that the situation in Pennsylvania differs to such an extent that the arrangements allowed in Massachusetts and other jurisdictions are not technically feasible in Pennsylvania.

Indeed, when asked to identify such differences in the various networks, Verizon was unable to do so, as shown by the following testimony of its own witness:

> Arbitrator Weismandel: ...Is it your position that the network in Pennsylvania is so fundamentally different from the network in Massachusetts that it would be technically infeasible to access at existing splice points?
>
> Witness Albert: I'm going to try to give you an answer, Your Honor.
>
> Arbitrator Weismandel: Well, give me a yes or no and then explain, but give me one of them first.
>
> Witness Albert: I'd say yes, they're the same.
>
> Arbitrator Weismandel: So that, no, it would not be technically feasible.
>
> Witness Albert: To do what?
>
> Arbitrator Weismandel: To access at existing splice cases in Pennsylvania the way it is—here's where we get into—I understand what you're saying. Let us assume for the question that there is at least one technically feasible way to interconnect at a splice case. Is that a realistic assumption; that there is at least one way that it can be done properly?
>
> Witness Albert: I would say yes, but the way to do that is you make something else. This may sound cryptic, but, in essence, if you build a configuration at an existing splice points, that when you were done, the location for the physical interconnection of the CLEC and the Verizon fibers would occur, if that is an accessible terminal, then I believe that is technically feasible to do; and that is one of the construction configurations that I though Mr. Donovan might be describing in his affidavit.
>
> Arbitrator Weismandel: Okay. So there is, at minimum, one technically feasible way of doing it; correct?
>
> Witness Albert: Yes
>
> Arbitrator Weismandel: Okay. Bearing in mind that one, is there something fundamentally different about the network in Pennsylvania from the network in Massachusetts that would make it technically feasible to use that

method in Massachusetts but not technically feasible to use that method in Pennsylvania?

Witness Albert: No.

(Tr. pp. 148-149).

We note that the question of technical feasibility was posed to Verizon's witness a number of times and the witness never responded that it was technically infeasible for Verizon Pennsylvania to provide access at existing splice points. However, we shall not adopt the ALJ's recommendation. Our review of the record in this proceeding indicates that there is an insufficient evidentiary basis to support the ALJ's conclusion that Verizon should provide CLECs access to dark fiber at existing splice points. Under these circumstances, the ALJ's result is too far-reaching given the limited record developed in this abbreviated arbitration proceeding on such a sophisticated technical issue.[9] As such, we believe that it would be prudent and in the best interest of the public to proceed cautiously on this matter in order to ensure that the integrity of the network is maintained.

We note that in our UNE proceeding, we deferred disposition on the question of accessibility of dark fiber at splice points, pending the convening of a dark fiber technical workshop to address with specificity all technical issues attendant to this issue. (*Interim UNE Opinion and Order,*[10] pp. 56-58). We are mindful that there are various technical considerations, which should be explored and addressed on this issue. Rather than adopt a piecemeal approach, we believe that the better approach would be to determine whether industry standards for accessing Verizon's existing dark fiber splice points can be implemented in such a way that are responsive to the needs of Verizon,

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[9] This in no way reflects negatively on the ALJ's recommendation. The ALJ, in his position as arbitrator, did everything possible to attempt to resolve this issue in the limited time available.

[10] *Further Pricing of Verizon Pennsylvania, Inc.'s Unbundled Network Elements*, Docket No. R-00005261 et al. (June 8, 2001).

Yipes, and all other CLECs, while ensuring that there is no significant degradation to the network. Therefore, we shall reserve disposition on the issue of accessibility of dark fiber at existing splice points until the conclusion of the dark fiber technical workshop, which shall be expanded to include the establishment of industry standards that would apply if we decide to permit CLECs to request access to dark fiber at existing splice points.[11]

Based on the foregoing, the resolution of this issue shall be held in abeyance, pending the outcome of the dark fiber technical workshop. As such, for the immediate purpose of the instant proceeding, we shall deny, without prejudice, both Verizon's and Yipes' Exceptions to modify the language of Section 7.4.2 and 7.4.5. Further, we direct that the dark fiber technical workshop be expanded consistent with the above discussion.

3. Issue #5

Whether Verizon may deny access to dark fiber at Yipes-directed and Verizon-created new splice points? (UNE Attachment 7.4.2)

a. Positions of the Parties

This issue is related to Issue 3 and concerns whether Yipes may cause Verizon to provide access to dark fiber by constructing a new splice. During the proceeding, Yipes' position was that the best practices mandate requires Verizon to allow access to dark fiber at Yipes-directed and Verizon' created new splice points. (Yipes

[11] As will be discussed later in this Opinion and Order, the dark fiber technical workshop will also be expanded to address the establishment of technical standards related to CLEC access to dark fiber at new splice points.

BFO, p. 18). In support of this contention, Yipes referenced an Indiana Commission decision, *AT&T Communications of Indiana, Inc,* case number 40571-INT-03 (November 2000), which held that, where technically feasible, access to new splice points must be permitted. Yipes concluded that Verizon failed to demonstrate that the Ameritech's Indiana network was different from the Verizon's Pennsylvania network. As such, Yipes took the position that Verizon must provide access to new splice points pursuant to the FCC's best practices mandate. Yipes proposed revised language to Section 7.4.2, as noted. (Yipes Best and Final Offer, p. 21). Verizon disagreed with Yipes' position, offering the same contract language the ILEC proposed with respect to Issue #3. (Verizon Best and Final Offer, p. 15).

b. ALJ Recommendation

The ALJ recommended adoption of Yipes' proposed language with some reservation and limitation. He noted that Verizon failed to offer any evidence to show that the Indiana and Pennsylvania networks differ to such an extent as to render technically infeasible Verizon's provision of unbundled access to the dark fiber subloop element at new splice points in Pennsylvania, under the FCC's best practices mandate. ALJ Weismandel was mindful that both Parties agreed that it was in the public interest to set a limit on the number of new splices allowed in Pennsylvania's network. For this reason, he concluded that adoption of Yipes' proposed language on this issue would be subject to the findings and outcome of the Commission's pending dark fiber technical workshop in *Interim UNE Opinion and Order.* (R.D., p. 13).

c. Exceptions

Yipes excepts to the ALJ's recommendation for the same reasons discussed in its objections to Issue #3.

Verizon also excepts to the ALJ's recommendation on this issue. According to Verizon, the ALJ's interpretation that the Indiana Commission held that ILECs must provide access to dark fiber at existing and new splice points is erroneous. Instead, Verizon explains, the Indiana Commission ordered an ILEC to splice its own fiber end-to-end to make a continuous route for a CLEC where a continuous route does not yet exist. (Verizon Exc., p. 6). Verizon adds that contrary to the ALJ's conclusion, the "Indiana Commission did not order Ameritech to permit CLECs to splice their fiber to Ameritech's fiber to provide unbundled access to dark fiber at splice points." (*Id.*, p. 6). Consequently, Verizon proffers that on the issue of access to dark fiber at splice points, the Indiana Commission's decision has no relevance and the ALJ's recommendation should be rejected.

d. Disposition

For the same reasons articulated in our disposition of the related Issue #3, we deny the respective Exceptions of Verizon and Yipes on this issue. We agree with the ALJ's recommendation that the resolution of this matter, including whether access to new splice points should be permitted, should be subject to the outcome of the dark fiber technical workshop.

4. Issue #11

Whether Verizon may require Yipes to complete building its collocation prior to assigning Yipes dark fiber facilities? (UNE Attachment 7.6)

a. Position of the Parties

This matter is related to whether Verizon should make explicit, in conducting activities under the agreed-upon parallel provisioning trial for dark fiber, that

it is required to adhere to the remote terminal information commitments that it made as a part of receiving favorable Commission action in its Section 271 Application.[12]

Both Yipes and Verizon agreed to identical language in their respective Final Best Offers to conduct a parallel provisioning trial similar to the trial between Verizon and Cavalier Telephone Mid-Atlantic, LLC that was filed on June 6, 2001, in accordance with Verizon's Section 271 proceeding. Under the proposed parallel provisioning trial, Verizon would provision Yipes with unbundled dark fiber to a temporary location in Verizon's remote terminal after Verizon has accepted Yipes' collocation request for that remote terminal, but before Verizon has completed the collocation request. Yipes concedes that parallel provisioning is an improvement over Verizon's present policy whereby Verizon begins processing orders for dark fiber only after a CLEC has completed building its collocation.

The only disagreement between the two Parties on this issue relates to the activities that are to be conducted under the agreed-upon parallel provisioning trial. As part of that agreement, Verizon would have to adhere to the remote terminal information commitments it made as a part of its receiving favorable Commission action in its Section 271 Application. These commitments are delineated on pages 16- 17 of the ALJ's Recommended Decision.

b. ALJ Recommendation

The ALJ recommended that Yipes' position should be approved and adopted for the following reasons:

1. Verizon made commitments to provide remote terminal information in order to induce the

[12] *See Consultative Report on Application of Verizon Pennsylvania, Inc. for FCC Authorization to Provide In-Region InterLATA Service in Pennsylvania*, Docket No. M-00001435.

Commission to report favorably on its 271 Application;

2. The Commission relied upon Verizon's remote terminal information commitments, in part, in acting favorably on Verizon's 271 Application;

3. The difference between the Cavalier/Verizon trial and the Yipes/Verizon trial lies in the fact that Cavalier's trial occurs at Verizon's Central Offices while Yipes' trial occurs at Verizon's remote terminals, which must be identified for Yipes to be able to include them in the trial.

As such, the ALJ recommended that the proposed Trial Agreement (Yipes Exhibit 1, Verizon Exhibit B) should be entered into by Yipes and Verizon with the express understanding that Verizon is bound by the commitments regarding remote terminal information. Moreover, the ALJ recommended that the language contained in Yipes' Final Best Offer with regard to the Unbundled Network Elements (UNEs) Attachment Section 7.6 should be approved and adopted. (R.D., p. 17).

c. Exceptions

Although Verizon states that it continues its commitment to conduct a parallel provisioning trial with Yipes, Verizon excepts, in part, to the ALJ's resolution of this issue. Verizon argues that adoption of Yipes' proposed language would not clearly define Verizon's obligations with respect to the trial. As such, Verizon requests alternative language to clarify its parallel provisioning trial obligations under the agreement. (VZ Exc., pp. 2, 18-19).

Specifically, Verizon excepts to the proposed additional language for Section 7.6 of the Agreement. It contends that this language does not make it sufficiently clear that Verizon is only obligated to comply with its business rules and regulatory

requirement, which was the result intended by the ALJ and Yipes.[13] Therefore, Verizon requests that Yipes' proposed language be revised as follows:

> In conducting the Yipes-Verizon PA parallel provisioning trial, Verizon PA will comply with the remote terminal information commitments that it made in connection with its 271 Application with the Pennsylvania Commission. *See Consultative Report of the Public Utility Commission,* CC Docket No. 01-138, June 25, 2001, p.135.

(VZ Exc. pp. 19-20).

d. Disposition

Based upon our review of Yipes' Best and Final Offer (pp. 26-32), we agree with Verizon that the proposed clarifying language will more accurately accomplish the result sought by the ALJ and Yipes. Therefore, we shall grant Verizon's Exceptions on this matter and adopt its alternative additional language for Section 7.6 of the Agreement.

5. Issue #13

Whether Verizon may make an unspecified amount of strands per cable unavailable as "maintenance strands"? (UNE Attachment 7.4.10.3)

(a) Positions of the Parties

Verizon proposed language for Section 7.4.10.3 of the UNE Attachment which would permit it to assign dark fiber to itself for maintenance spares in accordance with its standard maintenance procedures. (VZ BFO, p. 22). Verizon's proposed language stated the following:

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[13] The originally proposed language proposed by Yipes in Section 7.6 of the Agreement is as follows: "Verizon and Yipes shall conduct a parallel provisioning trial in accordance with the order of [date] of the Commission in Docket No. A-310694."

> Verizon may assign Dark Fiber for maintenance purposes, in accordance with Verizon's standard maintenance practices and/or for known near-term customer service requirements, including orders for individual customer fiber optic services and aggregate customer demands requiring the application of fiber optic technology;

Verizon, incorporating by reference its arguments in the Commission's UNE Proceeding, asserts that it should be permitted to use dark fiber for maintenance purposes in accordance with its standard maintenance practices and that the standard number of maintenance fibers used is not substantially greater, and in many cases is fewer, than the number of maintenance spares proposed by Yipes in a "redline" version of a template interconnection agreement. (VZ BFO, p. 23).

In this Commission's UNE Proceeding, we adopted the fiber reservation policy adopted by the Massachusetts DTE in its *Phase 3 Order*. Pursuant to this policy, the ILEC is limited to five percent, or a minimum of two, fibers per cable. Verizon vigorously disputes the applicability of the Massachusetts decision and the correctness of the merits of that decision. (VZ BFO, p. 23). Verizon notes that it has sought reconsideration of the Commission's determination in the UNE Proceeding and asserts that the maintenance spare practice is ill advised given the rapid increase in growth in demand for telecommunications services. Verizon is concerned that the policy will, *inter alia*, increase the duration of Pennsylvania service outages because "[f]iber optic systems carry an enormous volume of traffic, and Verizon PA needs to have sufficient maintenance spares available for rapid service restoration if the working fibers are cut, damaged, or simply fail." (VZ BFO, p. 24).

Yipes' position is that Verizon must abide by the Commission's determination in the UNE Proceeding. (Yipes BFO, p. 33). Its proposed language states as follows:

> Verizon may assign Dark Fiber for maintenance purposes and/or for known customer service requirements based on signed service orders for fiber-related services from given customers in accordance with the Pennsylvania PUC's determination set forth in the *Further Proceeding of UNEs Interim Order* issued June 8, 2001 at Docket No. R-00005261.

(Yipes BFO, pp. 33-34).

(b) ALJ Recommendation

ALJ Weismandel, similar to his recommendation on Issue #10, concluded that the dispute between Verizon and Yipes had been resolved by this Commission's determination in the UNE Proceeding. (R.D., pp. 18-19).

(c) Exceptions

In its Exceptions, Verizon reiterates its position as articulated in the UNE Proceedings, particularly its request for reconsideration filed in that docket. Verizon asserts that the 5% restriction will seriously undermine the reliability of its telecommunications system, and otherwise contribute to potential extended service outages in Pennsylvania in cases of emergency. (VZ Exc., p. 26). Verizon points out that it does not reserve its maintenance spares for future customer service needs, nor has there ever been any allegation that it has abused its maintenance practices. (*Id.*).

(d) Disposition

On consideration of the positions of the Parties, we are, at this time, unconvinced that our determinations in the UNE Proceeding[14] should be disturbed. For the reasons extensively considered in our denial of Verizon's request for reconsideration, we shall deny its Exceptions in this matter and direct that the proposed language of Yipes be included for the UNE Attachment.[15]

6. Issue #21

Whether Verizon may deny access to available dark fiber because Verizon thinks the request would strand an unreasonable amount of fiber capacity? (Interconnection Attachment 7.4.10.2)

(a) Positions of the Parties

This unresolved issue relates to the procedure to be followed where Yipes should make a request for dark fiber and Verizon has a reasonable belief that honoring such a request would strand an unreasonable amount of dark fiber. Verizon's position is that in the event it determines that provisioning the requested dark fiber would result in an unreasonable stranding of dark fiber, it would use the Commission's approved Abbreviated Dispute Resolution Process (ADRP).[16] Until this process is resolved, however, Verizon would not provide the dark fiber. (*See* VZ BFO, pp. 24-27).

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[14] *Interim UNE Opinion and Order* (June 8, 2001); *Order on Reconsideration* (August 30, 2001).

[15] In our Order denying Verizon's Petition for Reconsideration, we concluded that the Massachusetts policy contains sufficient flexibility to address network reliability concerns.

[16] See Appendix E to *Joint Petition of Nextlink, et al and Joint Petition of Bell Atlantic, et al (Global Order)*, Docket Nos. P-00991648 and P-00991649 (September 30, 1999) and *Order Establishing Revised Interim Guidelines for Abbreviated Dispute Resolution Process, Global Order*, (Adopted July 13, 2000).

Yipes' position is that Verizon should be required to process the service order while the petition for relief under ADRP is pending before the Commission. (Yipes BFO, p. 34). Yipes contends that Verizon's proposed procedure – doing nothing until the petition for relief is resolved – would result in Yipes' loss of the customer. (*Id.*).

Yipes explains that its position represents a compromise. It states:

> . . . while Verizon petitioned the PUC regarding the claim of unreasonable stranding, Verizon would process Yipes' order for the dark fiber through all of the provisioning steps right up to, but not including, actually turning the fiber over to Yipes. . . Yipes could inform its customer that the order is proceeding on course – a far different scenario than telling the customer that nothing will happen until the PUC rules on Verizon's stranding petition.

(Yipes BFO, p. 35).

Additionally, Yipes proposes to pay Verizon for all processing fees, even if Verizon ultimately prevails on its stranding claim, and, Yipes proposes modification of the ADRP through language that would require Verizon to file a petition for relief within seven days of informing Yipes of the unreasonable stranding claim. (Yipes BFO, p. 34).

(b) ALJ Recommendation

ALJ Weismandel recommended that Verizon's proposal be incorporated into the UNE Attachment.[17] ALJ Weismandel concluded that the Commission's ADRP procedures represent an expeditious process by which Yipes could challenge Verizon's actions. (R.D., pp. 19-20).

[17] Verizon, although it did not concur with Yipes' legal argument, agreed to remove its proposed Section 7.4.10.2 from the Agreement. (VZ BFO, p. 25).

(c) Exceptions

In Exceptions filed to the ALJ recommendation, Yipes emphasizes that pursuant to its proposal, Verizon would be made whole for any costs it may incur to get ready to provision the service order in the event the Commission should grant its petition for relief. (Yipes Exc., p. 12). Yipes further emphasizes the crucial impact of the proposed procedures on its business operations. (Yipes Exc., p. 13 citing Yipes Exh. 2 (Holdridge Affidavit, p. 8). Yipes finds objectionable the view attributed to Verizon that in the event it concludes that a request would strand their plant that they will not process the order. Such order would be rejected and Verizon would move on. In reality, complains Yipes, this determination would result in the loss of the customer. (Yipes Exc., p. 13).

Yipes also contrasts its requested procedure from that characterized by ALJ Weismandel as modifying the ADRP process. Yipes states that it seeks to resolve an ambiguity in Verizon's tariff that was revealed during the course of the arbitration. (Yipes Exc., pp. 13-14). Yipes takes the position that the ADRP does not address the question related to the withholding of dark fiber or withholding of make ready work or processing pending the disposition of a dispute related to the ILEC's claim of unreasonable stranding. Yipes finally notes that the ADRP process could take, at minimum, sixty days to resolve. This would be to the detriment of its business operations. (Yipes BFO, p. 14).

(d) Disposition

While we are sympathetic to the concerns of Yipes regarding possible delays in processing service orders for dark fiber pending disposition of a petition for relief filed under the Commission's ADRP, we are reluctant at this time, and based on this record, to endorse a disruption in the procedures established. It may be that the

ADRP is inadequate as a regulatory response to the resolution of disputes taking place in a competitive and dynamic marketplace. However, we must allow for a more generic evaluation and response. Based on the record herein, we shall adopt the ALJ's recommendation while noting that the appropriateness of ADRP to resolving disputes over dark fiber may be revisited in the context of certain dark fiber collaboratives and/or competitive safeguards proceedings.[18]

7. Issue #24

Whether Verizon may unilaterally cancel orders for service which had no activity within 31 consecutive calendar days? (Additional Services Attachment 8.11)

(a) Positions of the Parties

Yipes took the position that Verizon should not be permitted to cancel service orders that have been inactive for 31 consecutive calendar days. Yipes explained that there could be any number of reasons why a service order may be dormant for more than thirty days – including problems with Verizon's processing of the order through its operations support systems. (Yipes BFO, p. 41). Therefore, Yipes requested that Verizon notify it in a meaningful and timely manner of its intention to cancel service orders based on inactivity for more than thirty days. Yipes requested that the notice should be (1) in an "auditable" form, which would exclude voice mails or other means of communication that cannot be verified; and (2) designed to inform Yipes that service orders have been inactive for a prescribed period of time and allow Yipes the "opportunity" to react. (*Id.*).

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[18] We further acknowledge Yipes' offer to make Verizon whole pending resolution of a stranding dispute. However, Verizon responds that the "damage" it would be seeking to avoid would most likely occur before it is able to file a petition. Given that the stranding claim may involve potential harm which may not be able to be compensated with monetary consideration, we are still reluctant to grant Yipes' request.

Verizon states that the issue is whether it may cancel orders for service that have had no activity within thirty-one calendar days **after Verizon PA has provided Yipes with notice**. (VZ BFO, p. 30) (Emphasis Verizon).

Verizon's rationale for its proposed language is that it routinely provides notice to CLECs prior to canceling orders for service. Verizon witness Mr. Albert testified concerning this practice. (VZ BFO, p. 31). However, the notice provided in this testimony referenced "phone calls between technicians." *(Id.)*.

(b) ALJ Recommendation

ALJ Weismandel concluded that the issue is not a matter of Verizon's unilateral determination to cancel orders after thirty-one days. Rather, the dispute between Yipes and Verizon concerns how notice should be given by the ILEC after a thirty day period of inactivity with a service order and if the CLEC, after such notice, should have an additional period of time within which no activity occurs before cancellation of the order. (R.D., pp. 22-23).

ALJ Weismandel noted that Verizon's proposal indicated that the original service date is the event which begins the thirty-one day clock. However, "original service date" was not defined. This term was later identified by the testimony of a Verizon witness, to be in the form of a telephone call, after which Yipes would have thirty-one consecutive calendar days to engage in activity or face a service order cancellation. (R.D., p. 23).

With regard to Yipes' proposal, ALJ Weismandel concluded that the original service date would not be the triggering event for the thirty-one day period. Such period would begin on the notice transmittal date which could add to the period in which Yipes is tying up a dark fiber circuit without paying for such circuit. (R.D., p. 24).

Based on the foregoing, ALJ Weismandel concluded that while both Parties' proposals had merit, they each had flaws. He found Verizon's proposal to be generally vague regarding the fact that notice will be provided and that such notice would start the consecutive day period. Yipes' proposal was criticized as needlessly detailed. (R.D., p. 24). Therefore, he concluded that the proposed Interconnection Agreement at Section 29, which provided for the precise method in which notice is to be given, should be referenced as the standard for giving notice under the proposed Additional Services Attachment 8.11. Section 29 does not include a telephone call as an acceptable method for providing notice. However, ALJ Weismandel found adaptation of this provision to be acceptable so as to provide Yipes with notification, in a documented way, that it could, within thirty-one consecutive calendar days, face a service order cancellation. (*Id.*).

(c) Exceptions

Verizon excepts to the ALJ's recommendation to use Section 29 as the standard for transmitting notice to Yipes. Verizon states that Section 29 was never intended to provide the requirements for submitting notice for an activity as ordinary as notice of inactivity with respect to a service order. (VZ Exc., p. 23).

Verizon next criticizes Yipes' request for "auditable" notice. Verizon asserts that requiring a special form of notice for Yipes, separate and apart from the notice provided to all other CLECs, would require it to develop a new and potentially expensive notification system. (VZ Exc., p. 25). Based on the foregoing, Verizon submits that its proposal should be incorporated into the Agreement.

(d) Disposition

We conclude that we must balance the need to prevent service order inactivity from unduly occupying a scarce resource, dark fiber, with the need for clarity with regard to how a CLEC receives notice that its service order will be declared cancelled. We agree with Yipes that there could be provisioning glitches that are the responsibility of the ILEC which cause the delay as well as the lack of diligence by the CLEC. Neither proposal references, nor appears to contemplate which side is culpable regarding the delay.

Yipes' proposal appears to have a certain symmetry in that it would have Verizon transmit notice of the inactivity and pending cancellation in the same manner in which Yipes has submitted the order in the first instance. It is only when Verizon will not so provide notice, that Yipes seeks an "auditable" form of notice. (*See* R.D., p. 24).

However, Verizon points out that providing an "auditable" notice will impose significant administrative burdens on it. Verizon states:

> . . . requiring Verizon PA to provide some form of ***special*** "auditable notice" to Yipes – notice that departs from the ordinary business rules for such transactions – would be unfair and unduly burdensome to Verizon PA. Verizon PA provides notice to CLECs of non-activity with respect to a service order hundreds of times during any given month. . . . Verizon PA uses the method of telephone notification universally throughout Pennsylvania. (Tr. at 347).
>
> Requiring a special form of notice for Yipes, separate and apart from the notice provided to all other CLECs, would require Verizon PA to develop a new and potentially expensive notification system solely because Yipes

> apparently will not entrust its technicians with the responsibility to promptly follow-up on service orders. . . .

(VZ Exc., pp. 24-25) (Emphasis Verizon).

When we balance the foregoing considerations, we shall grant the proposal of Verizon in this instance. We conclude that the notice provisions of Section 29 are, as argued by Verizon, not suited for the day-to-day business communications necessitated by the operations support system interactions between the ILEC and CLEC. Nor were these notice provisions intended for such interaction. (*See* VZ Exc., pp. 21-23).[19] Additionally, the notice requested by Yipes, while symmetrical to the manner in which it has transmitted its order, does not account for the substantial administrative burdens encountered by Verizon as the dominant ILEC in Pennsylvania. (*See PMO Order*).[20] At this time, we conclude that the normal course of business practices between technicians for the ILEC and the CLEC require no more than mutual telephonic exchanges where the ILEC and CLEC have properly designated responsible employees and/or representatives for these purposes. Verizon's Exceptions are granted.

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[19] As explained by Verizon, the contact persons mentioned in Section 29 are high-level corporate officers of Yipes and Verizon. These are officers who, in the normal course of business, are not involved in the day-to-day technical and operational implementation duties as are the technicians.

[20] *See Joint Petition of Nextlink Pennsylvania, Inc., et al.*, Docket No. P-00991643 (Order entered December 31, 1999), et al.

III. CONCLUSION

The Parties are hereby directed to submit an interconnection agreement consistent with the dispositions contained in the body of this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Petition of Yipes Transmission, Inc., for Arbitration Pursuant to Section 252(b) of the Telecommunications Act to Establish an Inter-connection Agreement with Verizon Pennsylvania, Inc. is granted, in part, and denied, in part, consistent with the discussion and directives contained in this Opinion and Order.

2. That the Recommended Decision of Administrative Law Judge Wayne L. Weismandel, Acting as Arbitrator, issued on August 20, 2001, is adopted as modified, consistent with this Opinion and Order.

3. That the Exceptions of Yipes Transmission, Inc., and Verizon Pennsylvania Inc., are granted, in part, and denied, in part, consistent with this Opinion and Order.

4. That the Motion to Strike of Yipes Transmission, Inc. filed on September 18, 2001, is granted, consistent with this Opinion and Order.

5. That Issues Nos. 3 and 5, regarding accessibility of dark fiber at new and existing splice points, be and hereby are, referred to the dark fiber technical workshop initiated in *Further Pricing of Verizon Pennsylvania Inc.'s* Unbundled network Elements, Docket No. R-00005261, et al. (June 8, 2001), and that the workshop be expanded to consider and develop industry standards as referenced herein.

6. That within thirty (30) days of the entry date of this Opinion and Order, the Parties shall cause to be filed an executed agreement which sets forth all terms and conditions agreed to by the Parties or decided by the Arbitrator and this Commission.

7. That a copy of this Opinion and Order shall be served on the Commission's Bureau of Fixed Utility Services.

BY THE COMMISSION,

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: October 12, 2001

ORDER ENTERED: October 12, 2001